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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 159

GEORGE McCRAY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

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Argument

1. Where an arrest is purportedly predicated solely upon an alleged communication from a purported but unidentified "Reliable Informer", the arresting officer becomes the sole judge of the validity of his own arrest. No post-arrest judicial check is afforded and the accused, the trial court, the court of review, and, ultimately this Honorable Court are completely precluded from ever determining the actual existence of an informer; in short, whether, in fact, there was probable cause for the arrest.

   Only by requiring disclosure and giving the defendant an opportunity to present contrary evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the supposed informer, can the courts make a fair determination of the issue 7

2. The Sixth Amendment guarantees an accused the rights of confrontation, cross-examination, and compelling witnesses in his behalf. These guarantees have already been held applicable to and binding upon the States. These rights are denied when the prosecution is allowed to cloak in secrecy a purported informer whose supposed communications are offered in any way against an accused 79

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Illinois was filed on May 10, 1965, and is not reported. A petition for rehearing was timely filed and said petition was denied on September 27, 1965. The aforesaid original opinion was modified upon the denial of said petition for rehearing. This opinion is reported in 33 Ill. 2d 66, 210 N. E. 2d 161.

Both opinions were attached as Exhibits (A and B) to the petition for certiorari.

Jurisdiction

The opinion of the Supreme Court of Illinois as modified upon the denial of the petition for rehearing, was filed on September 27, 1965. The petition for certiorari was filed on December 20, 1965, and said petition was granted on May 23, 1966. The jurisdiction of this court rests upon Title 28 U. S. C., Section 1257(3).

Constitutional Provisions Involved

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing a place to be searched and the persons or things to be seized."

Fifth Amendment:

"no person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . "

Fourteenth Amendment:

" . . . Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1.

Whether "the right of the people to be secure in their persons . . . " has diminished to the point where an American citizen can be legally arrested on a public street solely upon uncorroborated purported information from an unnamed informer, and in the pre-dawn hours, in "extremely cold" weather be forced by the arresting officers to strip naked to his underwear so that a search of his person may be conducted, and then on the motion to suppress be denied the identity and/or production of the purported informer?

2.

Whether the Sixth Amendment's guarantee that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . " is applicable to, and binding upon a State prosecution on the issue of the existence of probable cause to make an arrest, where the said arrest is based solely upon alleged unsworn hearsay allegations from an unnamed and unproduced informer, when those hearsay allegations are contradicted under oath by the accused and such contradiction is uncontroverted?

3.

Whether the arresting officers' conduct in effectuating the instant arrest violated the Due Process Clause of the Fourteenth Amendment?

Statement of Facts

Petitioner was arrested by Chicago Police Officers Arnold and Jackson about 5:30 a.m., January 16, 1964, on a public street in the City of Chicago, Illinois (R. 6). Prior to being arrested, petitioner was walking through an alley (R. 6) and was committing no violation of any law (R. 11). The said officers had neither a search warrant nor an arrest warrant for the petitioner. Officers Arnold and Jackson stopped petitioner and placed him under arrest. The weather was "very cold" (R. 11) with snow on the ground (R. 7). The petitioner was not immediately taken to a police station, but instead was made to strip to his underwear. There is a dispute as to exactly where he took off his clothes; the petitioner testified that the officers "made me put off my clothes . . . outside the car" (R. 6), while Officer Arnold testified the stripping took place in the squad car (R. 17). A package of white powder, stipulated to be heroin, was seized from a cigarette package belonging to the petitioner, and this white powder was the subject of petitioner's pretrial motion to suppress (R. 3-5).

Petitioner further testified that prior to being arrested he was at a girl friend's house (R. 7).

Both Officers Jackson and Arnold testified that they arrested the petitioner after having had a conversation with a police informer, who had in the past supplied them with information which had proved to be accurate. They testified

that this informer told them that the petitioner could be found in a certain named vicinity, and that he was selling narcotics and had narcotics on his person (R. 9 & R. 15). Objections to defense counsel's questions seeking to establish the name and address of the alleged informer were sustained by the Court (R. 12 & R. 18).

Officer Arnold testified that when he encountered the petitioner he, Arnold, told the petitioner that the petitioner had been pointed out as having narcotics on his person; that the petitioner said, "you know I am not silly enough to walk with violations on me on the street"; and that he, Arnold, then told the petitioner, "If you are clean you will have nothing to worry about" (R. 16).

Petitioner's motion to suppress was denied by the Court, the heroin was introduced into evidence against him, over his objection, on his trial, and petitioner was found guilty of the unlawful possession of narcotics. He was sentenced to the Illinois State Penitentiary for two (2) years to two (2) years and one (1) day.

Summary of Argument

Where a police officer arrests a person and seeks to justify that arrest solely upon a purported communication from an informer, the informer should be identified upon request. If he is not identified the officer himself becomes the sole judge of the validity of his own arrest. In such case, the courts are forever precluded from determining if there was an informer, if he had previously given reliable information, if he made the communication, and, if so, whether it constituted probable cause. In short, if the purported informer is not identified and/or produced

there is no post-arrest judicial check on the arresting officer.

In addition, and no less important, the Confrontation Clause of the Sixth Amendment, already made applicable to the States, should now be held by this Court to apply to pretrial preliminary motions to suppress evidence. Inherent in this right of confrontation is the right of full cross-examination, and the Supreme Court of Illinois expressly concedes in this very cause that the petitioner's right to a full cross-examination was denied to him because of "the compelling policy to protect informers? . . . " (210 N. E. 2d 161, 164).

Lastly, this case well illustrates, in its particular factual setting, better than anything we can say, the inherent dangers present when police officers act unchecked and unrestrained by the judiciary.

The conduct of the officers in this case in stopping the petitioner, making him strip nearly naked in zero weather in the streets, telling him that if he had no contraband he had nothing to worry about, justifying their own arrest by what someone else had purportedly told them—this is conduct which shocks the conscience, conduct which violates even minimum standards of decency, and which certainly violates due process of law.

ARGUMENT

1.

Where an Arrest Is Purportedly Predicated Solely Upon an Alleged Communication From a Purported But Unidentified "Reliable Informer", the Arresting Officer Becomes the Sole Judge of the Validity of His Own Arrest. No Post-Arrest Judicial Check Is Afforded and the Accused, the Trial Court, the Court of Review, and, Ultimately This Honorable Court Are Completely Precluded From Ever Determining the Actual Existence of an Informer; in Short, Whether, in Fact, There Was Probable Cause for the Arrest.

Only by Requiring Disclosure and Giving the Defendant an Opportunity to Present Contrary Evidence as to the Truth of the Officer's Testimony and the Reasonableness of His Reliance on the Supposed Informer, can the Courts Make a Fair Determination of the Issue.

The exact question—whether the prosecution may constitutionally refuse to disclose and identify one whose purported communications are supposedly relied upon to establish probable cause for an arrest—has never been decided by this Court.

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution provides, in pertinent part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mapp v. *Ohio*, 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) held that the Due Process Clause of the Fourteenth Amendment rendered evidence obtained by a search and seizure in violation of the Fourth Amendment inadmissible in a state court as it is in a federal court.

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.
>
> IV
>
> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." (367 U. S. 655.)

Later, in *Ker* v. *California*, 374 U. S. 23, 10 L. Ed. 2d 762, 83 S. Ct. 1623 (1963) this Court re-affirmed the *Mapp* v. *Ohio* doctrine and held:

> "We reiterate that the reasonableness of a search is in the first instance a substantive determination to be

made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here." (374 U. S. 23, 33.)

Thus, we start with the premise that this Court,

"has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down subjective version of the individual guarantees of the Bill of Rights'" [*Malloy* v. *Hogan*, 378 U. S. 8, 10, 12 L. Ed. 2d 653, 84 S. Ct. 1489]

and that the validity of the search and seizure in the instant case is governed by "the criteria [previously] established by this Court" (*Ker* v. *California, supra*, 374 U. S. 23, 24).

And yet, as stated above, there really is no decision by this Honorable Court governing the instant issue—i.e. whether an informer whose supposed communications are relied upon by the prosecution to establish probable cause for an arrest must be produced, or at least identified.

In only a single case has this court ever sustained the validity of a warrantless arrest predicated solely upon the word of an informer.

In *Draper* v. *United States*, 358 U. S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959) a federal narcotic agent, one Marsh, testified that he had been informed on September 7, 1956, by one Hereford, a "special employee" of the Denver Bureau of Narcotics, that James Draper (petitioner) was peddling narcotics to several addicts in Denver, and that he would return from Chicago to Denver with a quantity of heroin on September 8th or 9th, 1956. According to Marsh, Hereford also gave Marsh a detailed physical description of Draper and of the clothing he was wearing, that he would be carrying a "tan zipper bag" and that he habitually "walked real fast" (358 U. S. 377, 309). Marsh testified that he and another officer went to the Denver Union Station and kept watch over all incoming trains on September 8th, but did not see anyone fitting the description given by Hereford. However, on September 9, they saw a person having the exact physical attributes and wearing the precise clothing alight from a Chicago train and walk "fast" toward the exit. (Respectfully, the opinion does not make it clear how the informer knew on September 7 exactly what clothing petitioner would be wearing on September 9.) Hereford died four days after the arrest and "therefore did not testify at the hearing on the motion" to suppress (358 U. S. 307, 310).

Over the dissent of Mr. Justice Douglas, six members of this Court sustained the validity of Draper's arrest.

But *Draper* is not authority for the precise question involved in the instant prosecution because in *Draper* the informer was named and fully identified, although he died four days after the arrest. And this Court seems to imply that were Hereford alive he would have been made available and would have testified:

"Hereford died four days after the arrest and *therefore* did not testify at the hearing on the motion." [358 U. S. 307, 310, emphasis added.]

More important, it has not been made clear by this Court whether *Draper* v. *United States*, 358 U. S. 307, is still the governing law in the light of this Court's subsequent decision in *Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, discussed below. That is to say, the Court in *Draper* was not "informed of some of the underlying circumstances from which the officer [Marsh] concluded that the informant [Hereford] . . . was 'credible' or his information reliable" (378 U. S. 108, 114).

In addition, in *Draper* "the evidence offered on the hearing on the motion to suppress was not substantially disputed" (358 U. S. 307, 309) as it was so disputed here. In the case at bar, the petitioner testified that the information allegedly given to the officer by the informer was false. That is, petitioner testified that he was at his girl friend's house prior to being arrested (R. 7), whereas the officers alleged that their informer said the petitioner was on the street selling narcotics (R. 9).

More recently, this Court examined the validity of a State arrest based upon the alleged communication from another informer.

In *Beck* v. *Ohio*, 379 U. S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223 (1964), the petitioner was arrested in his automobile, taken to the police station, searched, and clearinghouse slips seized from his sock. The arresting officer testified he had a picture of the petitioner and knew what he looked like; knew petitioner had a "record in connection with scheme of chance" (379 U. S. 89, 93), and that he had received information about the petitioner.

This Court held that the information in the possession of the arresting officers "at the moment of the arrest" would not "warrant a man of reasonable caution in the belief that an offense had been committed" (379 U. S. 89, 96).

This Court again made clear that an arrest, like a search, would be given greater constitutional preference if the decision to arrest (or to search) were made by a neutral and detached magistrate rather than the officer himself—i.e. if a warrant had first been obtained. The Court said:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. 'Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.' Wong Sun v. United States, 371 U. S. 471, 479-480, 83 S. Ct. 407, 413, 9 L. Ed. 2d 441. Yet even in cases where warrants were obtained, the Court has held that the Constitution demands a greater showing of probable cause than can be found in the present record. Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723; Giordenello v. United States, 357 U. S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503; Nathanson v. United States, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159" (379 U. S. 89, 96).

Accord: *United States* v. *Ventresca*, 380 U. S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741, where Mr. Justice Goldberg, speaking for seven members of this Honorable Court, sustained the validity of the search warrant.

> "In Jones v. United States, 362 U. S. 257, 270, 80 S. Ct. 725, 735, 4 L. Ed. 2d 697, this Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. In Johnson v. United States, 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436, and Chapman v. United States, 365 U. S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828, the Court, in condemning searches by officers who invaded premises without a warrant, plainly intimated that had the proper course of obtaining a warrant from a magistrate been followed and had the magistrate on the same evidence available to the police made a finding of probable cause, the search under the warrant would have been sustained.
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> • • • • • •
>
> The fact that exceptions to the requirement that searches and seizures be undertaken only after obtaining a warrant are limited underscores the preference accorded police action taken under a warrant as against searches and seizures without one." (380 U. S. 102, 106.)

The officers in the instant case did not obtain an arrest warrant, nor did they have a search warrant (R. 11). No reason for not having applied for one was advanced (R. 11). This Court has held that the failure to obtain a search warrant will of itself nullify the search of a home though there be probable cause to justify the issuance of a search warrant.

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." (*Johnson* v. *United States*, 333 U. S. 10, 13, 92 L. Ed. 2d 436, 440, 68 S. Ct. 367.)

And, this Court has made it clear that

"The language of the Fourth Amendment, that '. . . no Warrants shall issue, but upon probable cause . . .' of course applies to arrest as well as search warrants." [*Giordenello* v. *United States*, 357 U. S. 480, 485, 2 L. Ed. 2d 1503, 1509, 78 S. Ct. 1245, 1250.]

Thus it cannot be contended, legally, logically, or otherwise that the above quoted language from *Johnson* v. *United States*, 333 U. S. 10, 13, does not apply to arrests, as in the case at bar, without a warrant.

The decision in the case at bar clearly is in conflict with this Court's decision in *Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509.

In *Aguilar*, two Houston police officers obtained a search warrant to search the petitioner's home. In support of their

application the officers submitted an affidavit which, in relevant part, recited that:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." (378 U. S. 108, 109.)

The search warrant issued. But this Court held that the warrant had been improvidently granted because the affidavit did not provide a sufficient basis for a finding of probable cause.

In striking down the warrant your Honors said:

> "Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an identified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'" (378 U. S. 108, 113.)

This Court then concluded that:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal obser-

> vations of the affiant, * * * the magistrate must be informed of some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * * was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by neutral and detached magistrate,' as the Constitution requires but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' * * * or, in this case, by an unidentified informant." (378 U. S. 108, 114.)

If we *assume* in the case at bar that the officers spoke the truth when they testified that previous to arresting the petitioner they had had a conversation with a police informer; if we *assume* that this informer had previously given information which had proved accurate or "reliable"; and if we further *assume* that the informer told the arresting officers that he had just seen the petitioner selling narcotics on the street at 7:00 a.m. in below zero weather, there still was no probable cause under *Aguilar*.

In the case at bar, the arresting officers are in the position of the magistrate in *Aguilar*, and the informer's information must *at least* meet the requirements of an affidavit to a magistrate in order to show probable cause either for a search or for an arrest. We are still left with the "'mere conclusion' that the petitioner possessed narcotics [which] was not even that of the [arresting officer] himself; it was that of an unidentified informant." (378 U. S. 108, 113.)

Since, even assuming all of the above, we still don't know why or upon what basis the informer concluded that what

he allegedly saw petitioner sell was in fact narcotics, the officers' testimony "not only 'contains no affirmative allegation that the [informer] spoke with personal knowledge of the matters . . . ;' it does not even contain an 'affirmative allegation' that the [officers'] unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in the petitioner's possession." (378 U. S. 108, 113.)

Without the testimony of the purported but unidentified source, it can truly be said, in the language of *Aguilar*, that the arresting officers, the trial court, and the Supreme Court of Illinois

> "could not 'judge for [themselves] the persuasiveness of the facts relied on . . . to show probable cause.' [They] necessarily accepted 'without question' the informer's 'suspicion', 'belief' or 'mere conclusion'." (378 U. S. 108, 113.)

It is respectfully submitted that *Aguilar* v. *Texas*, 378 U. S. 108, leaves but one logical answer to the question posed—i.e. whether an accused is entitled to production of an informer on the issue of the existence of probable cause to make an arrest without a warrant. That answer should only be "yes." Only through the alleged informer's testimony can anyone (other than the arresting officers) determine the "persuasiveness of the facts relied on to show probable cause" (378 U. S. 108, 113). And such discretion, history teaches, should not be left in the hands of the police.

As stated, no warrant was obtained in case at bar, and the trial court sustained objections to the identification of the person who allegedly gave the police the information

leading to the arrest of the petitioner (R. 12 & 18). While this Court has never completely answered the question as to whether the Constitution demands and requires that this so-called "informer privilege" give way when an officer acts without a warrant, and purportedly upon the informer's communication in making an arrest, this Court did approve some federal cases which hold that production and identification of the informer is required.

In *Roviaro* v. *United States*, 353 U. S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957) the petitioner was indicted for having sold heroin to one "John Doe", a police informer. All defense efforts to obtain disclosure of the identity of "John Doe" were denied by the Court, and the petitioner was convicted. This Court first examined and restated the nature of the privilege, and then spoke approvingly of those federal cases requiring that the identity of the informer be produced where the legality of a search without a warrant is questioned. Speaking for the Court, Mr. Justice Burton stated:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. Scher v. United States, 305 U. S. 251, 254, 83 L. Ed. 151, 154, 59 S. Ct. 174; Re Quarles, 158 U. S. 532, 39 L. Ed. 1080, 15 S. Ct. 959; Vogel v. Gruaz, 110 U. S. 311, 316, 28 L. Ed. 158, 160, 4 S. Ct. 12. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement offi-

cials and, by preserving their anonymity, encourages them to perform that obligation.

The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication." (353 U. S. 53, 60.)

In the case at bar, it is entirely undisputed that there was absolutely no "evidence apart from [the informer's] communication." (R. 14 & 18.)

Roviaro v. *United States,* 353 U. S. 53, was quoted extensively in both the majority and the dissenting opinions

in *Rugendorf* v. *United States*, 376 U. S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825 (1964).

In *Rugendorf*, the defendant's home was searched pursuant to a search warrant. The warrant was based upon an affidavit signed and attested to by one Marlin Moore, a Special Agent of the F. B. I. In the affidavit, agent-affiant Moore swore, in substance, that on a stated date he had been told by a "confidential informant who had furnished reliable information in the past" (376 U. S. 528, 530), that during the previous week he, the informant, had seen in the basement of the home of Samuel Rugendorf (petitioner), certain furs; that the labels had been removed, and that the informant had been told that the furs were stolen.

Agent-affiant Moore further asserted in his affidavit that another F. B. I. agent, one McCormick, had told affiant that a "confidential informant whom the F. B. I. had found to be reliable" told McCormick certain things. Among these, were the following two incorrect and erroneous statements:

A) That Rugendorf Brothers Meat Market was managed by Samuel Rugendorf (petitioner), and

B) That Samuel Rugendorf was associated in the meat business with his brother Leo (alleged to be a fence for one Frank Schweihs, one of the alleged robbers of the furs).

Petitioner attacked the validity of the search warrant contending that there was no probable cause for its issuance. In so doing, petitioner demanded the name of the informer.

This Court held that the petitioner was not entitled to the name of the informer in his attack on the validity of the search warrant. In so holding this Court made the following pronouncement:

"The factual inaccuracies depended upon by petitioner to destroy probable cause—i.e., the allegations in the affidavit that petitioner was the manager of Rugendorf Brothers Meat Market and that he was associated with his brother Leo in the meat business—were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." (376 U. S. 528, 532.)

* * * * *

"Petitioner also contends that the withholding of the identities of the informants was a sufficient ground to require suppression of the evidence. But in Jones, supra, we said that 'as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants * * * to be produced * * * so long as there was a substantial basis for crediting the hearsay' 362 U. S. at 272, 80 S. Ct. at 736, 4 L. Ed. 2d 697. Petitioner's only challenges to the veracity of the affidavit are the two inaccurate facts mentioned above. Since the erroneous statements that 'petitioner was the manager of Rugendorf Brothers Meat Market and was associated with Leo in the meat business were not those of the affiant,' they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant." (376 U. S. 528, 533.)

* * * * *

The case at bar is thus distinguishable from the *Rugendorf* decision. The most obvious distinction is, of course, that *Rugendorf* involved the validity of a search warrant thus bringing into the picture a "neutral and detached magistrate." In addition, in the case at bar, the arresting officers testified that the informer had told them that he, the informer, had just seen the defendant selling narcotics on the street. But the defendant testified that prior to being arrested he had been at his girl friend's house, located at a certain address. Thus the specific unsworn hearsay allegations of the purported informer were contradicted by the accused. That is to say, the factual inaccuracies of the unidentified informer were not of "peripheral relevancy" (that he allegedly had just seen the petitioner selling narcotics on the street). Furthermore, they purported to be within the personal knowledge of the informer, and thus they went to the integrity of the informer's purported communication. *Rugendorf* v. *United States*, 376 U. S. 528, is thus authority—in the factual situation of the case at bar—for the proposition that the informer should have been produced. The Illinois Supreme Court thus erred in holding that *Rugendorf* does not compel disclosure in the instant case, when that Court stated:

> "The subsequent denial of a sale by the defendant cannot affect the issue of whether or not the officers had a reasonable basis to believe he was committing a crime." [*People* v. *McCray*, 33 Ill. 2d 66, 210 N. E. 2d 161, 163.]

Long ago, as a matter of criminal procedure, under different circumstances, this Court indicated its approval of any fair method that would bring forth the truth. In

Graves v. *United States,* 150 U. S. 118, 37 L. Ed. 1021 (1893), this Court, speaking through Mr. Justice Brown, concluded:

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. I Starkle, Ev. 54; People v. Hovey, 92 N. Y. 554, 559; Mercer v. State, 17 Tex. App. 452, 467; Gordon v. People, 33 N. Y. 508." (150 U. S. 118, 121.)

Full and complete disclosure, not concealment and secrecy, should be the guideposts. History has taught us that the police cannot be trusted with such serious matters. "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States* v. *Reynolds,* 345 U. S. 9, 97 L. Ed. 727, 734, 73 S. Ct. 528, 32 ALR 2d 382.

An analogous situation which immediately comes to mind is that involving the production of government witness reports. In such a situation, this Court has held, the Government has a choice: Disclose or Dismiss. Such was the ruling of this Court in *Jencks* v. *United States,* 353 U. S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007.

The rationale is simple: "The interest of the United States in a criminal prosecution . . . is not that it shall win a case, but that justice shall be done." *Berger* v. *United States,* 295 U. S. 78, 88, 79 L. Ed. 1314, 1321, 55 S. Ct. 629 [353 U. S. 657, 668].

No less should be the interest of a State in a State prosecution.

Jencks v. *United States*, 353 U. S. 657, involved the production, upon demand, of government reports containing statements of government witnesses relating to the events and activities to which these witnesses testified at the trial. Your Honors compelled such disclosure in the interest of justice. Among the authorities relied upon by the Court was the following quotation written by one of America's greatest jurists, the late Judge Learned Hand in *United States* v. *Andolshek*, 2d Cir., 142 F. 2d 503, 506:

> "'. . . While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively . . .'"

The Court in *Jencks* ruled that an accused was entitled to inspect the said reports:

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, Roviaro v. United States, 353 U. S. 53, 60, 61, 1 L. Ed. 2d 639, 644, 645, 77 S. Ct. 623. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." [353 U. S. 657, 672.]

In the very last case decided during the 1966 Term of this Honorable Court, *Dennis* v. *United States*, —— U. S. ——, —— L. Ed. 2d ——, 85 S. Ct. 1840, this Court again emphasized this now-governing principle that there is a

> ". . . growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act 18 U. S. C. §3500, responding to this Court's decision in Jencks v. United States, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials,

judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice." [86 S. Ct. 1840, 1849.]

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"... it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."

• • • • •

"... In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." [86 S. Ct. 1851.]

But this is not all. Perhaps the most heinous aspect of the instant problem revolves around the probability—if not certainty—that for every arrest made, for every search and seizure conducted in which contraband is discovered, there are countless hundreds, if not thousands, in which nothing except innocent people are uncovered. It is only the guilty that are brought into the police station, "booked", and later brought to trial. It is submitted that no clearer example of this practice could be conjured up than the instant cause.

If the arrest here were not more than a mere sham or pretext to search, if the arrest was not in actuality predicated upon the findings of the search, why didn't the officers take the petitioner immediately to the station instead

of stripping him naked in the street in order to determine whether the petitioner had any contraband on his person? If the officers really had legitimate probable cause for this arrest what did officer Arnold mean when he testified that he told the petitioner upon stopping him, "If you are clean you will have nothing to worry about"? (R. 16). Officer Arnold's own words belie his veracity. His own statement, quoted above, clearly demonstrates that this was an arrest based only upon suspicion—suspicion of the arresting officers and no one else. But,

> "Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." [*Henry* v. *United States*, 361 U. S. 98, 104, 4 L. Ed. 2d 134, 139, 80 S. Ct. 168.]

Such was what Professors Hogan and Snee of Georgetown University had in mind when they wrote in 47 Geo. L. J. 22:

> ". . . it must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more economically, and with much more dispatch. It is equally true, however, that society cannot confer such power on the police with-

out ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny." [Quoted from Mr. Justice Douglas' dissent in *Draper* v. *United States*, 358 U. S. 307, 321.]

If police officers are allowed to make arrests and then justify those same arrests by merely stating that they acted on a tip from some unidentified source, the officer himself becomes the sole judge of the validity of his own arrest. The Framers of the Fourth Amendment recognized this very danger when they determined that, absent some grave emergency, a magistrate should be interposed between the police officer and the citizen.

We must never forget, in the words of Mr. Justice Douglas, speaking for this Court in *McDonald* v. *United States*, 333 U. S. 541, 93 L. Ed. 153, 69 S. Ct. 191, that

> "Power is a heady thing; and history shows that the police acting on their own cannot be trusted." [333 U. S. 451, 456.]

These requirements are, of course, for the protection of the innocent and guilty alike. The Fourth Amendment thus protects the countless thousands of detentions that

occur in which no formal charges are made. Mr. Justice Jackson recognized these hazards in his dissenting opinion in *Brinegar v. United States*, 338 U. S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302 wherein he wrote:

"Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

"But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

"Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest

is made, about which courts do nothing, and about which we never hear.

"Courts can protect the innocent against such invasion only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.

* * * * *

"So a search against Brinegar's car must be regarded as a search of the car of Everyman.

"We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the act in terms of money.

"But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in

the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.

"And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies." [338 U. S. 160, 180.]

This prescript pronounced by Mr. Justice Jackson was recently again recognized in *Miranda* v. *Arizona*, —— U. S. ——, 16 L. Ed. 2d 694, 86 S. Ct. 1602, where Mr. Chief Justice Warren, speaking for five members of the Court, stated:

"A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests 'for investigation' subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, California v. Stewart, police held four persons, who were in the defendant's house at the time of arrest, in jail for five days until defendant confessed. At that time they were finally released. Police stated that there was 'no evidence to connect them with any crime.' Available statistics on the extent of this practice where it is condoned, indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause." [86 S. Ct. 1602, 1632.]

In footnote No. 53 from the above quotation the following also appears on the same page (86 S. Ct. 1602, 1632):

"53. See, e.g., Report and Recommendations of the Commissioner's Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three 'stocky' young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight before being released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H.R. 11477, S. 2970, S. 3325, and S. 3355 (July 1958), pp. 40, 78."

In *Jones* v. *United States*, 266 F. 2d 924, 930 (quoted extensively, *infra*) Mr. Justice Bazelon also tells us about mass arrests without probable cause in the District of Columbia, and of the A. C. L. U. study in Chicago:

"For example, the victim of a recent robbery in the District of Columbia reported that it was perpetrated by three 'stocky' young negroes. Ninety persons answering that description were arrested—67 of them were detained in headquarters overnight. None of the 90 were ever charged with the crime.

"During an inquiry into the circumstances of this roundup, the Superintendent of Police stated that 'large-scale interrogations' were not unusual, and he

cited specifically a recent investigation involving four murders during the course of which 6,170 persons were detained by the police. Washington Daily News, Jan. 21, 1958, p. 5, col. 1; Washington Post-Times Herald, March 3, 1958, p. B-1; Washington Evening Star, March 3, 1958, p. B-1. And see Trilling v. United States, 1958, 104 U. S. App. D. C. 159, 167, 260 F. 2d 677, 685 (concurring opinion). Junius L. Allison, Field Director of the National Legal Aid and Defender Association, recently wrote:

> 'Let's look at the figures reported by the FBI in the Uniform Crime Reports from the various states. In 1956 there were 111,274 individuals taken into custody on suspicion. These were not in connection with any specific crime. In the same year, 264,601 were apprehended where there was suspicion of guilt of particular crime. All of these—375,875, were later released without charge.' 42 J. Am. Jud. Soc. 113, 117 (1958).

And see 'The past is Prologue,' 38th Annual Report of the American Civil Liberties Union 84-85 (1958), discussing a private survey of Chicago police practices:

> 'The ACLU study, based on a sample 2,024 file cases selected at random from records of the Chicago Municipal Court in 1956, revealed that at least 20,000 persons were detained illegally 17 hours or more. Almost 2,000 of these defendants were held for two days or longer. And between 350 and 400 were held for at least three days "without charge, without bail having been set, without any vestige of

'due process of law' having been accorded them.'"'
[266 F. 2d 924, 930, footnote #21.]

In a recent weekly magazine article (*TIME*, July 8, 1966, page 65) a story illustrated vividly the principle that such matters as when to restrain a citizen's liberty of movement is too grave, too serious a business to be left in the hands of petty officers (and, we add, their alleged informants). According to the article, in Baltimore, in 1964, a police "squad spent 19 days in round-the-clock raids of more than 300 homes in Negro neighborhoods. They had arrest warrants—but they never once bothered to get search warrants. They acted in such classic disregard of the Fourth Amendment that a U. S. Appellate Court has just condemned them for the most flagrant invasions of privacy ever to come under the scrutiny of a federal court."

Judge Simon Sobeloff was quoted regarding this lawless police action as follows:

> "The determination of what constitutes probable cause is still left to the policeman."

And thus it is in the case at bar, "still left to the policeman."

Again, this Court cannot say, the Supreme Court of Illinois could not say, and the trial court could not determine whether the officers had an informer at all; if so, whether he was "reliable"; if so, whether he gave the officer the information upon which they allegedly acted; and, if so, whether the informer (assuming there was one) was justified in so stating. The officers here made the sole and non-reviewable determination that there was probable cause.

Long ago, the poet John Gay authored a couplet about the lack of an opportunity to contradict a statement:

"When we risk no contradiction,
It prompts the tongue to deal in fiction."

Most respectfully, if your Honors affirm the instant conviction and allow arresting officers to withhold the identity of their supposed informers, your Honors will silently countenance those officers to "deal in fiction", thereby submerging the time-honored and tested requirements for probable cause. If this is done we can predict with absolute certainty that countless arrests will be made, and sustained, solely on the officer's word that "We received information from a reliable informer (R. 8 & 15) . . . he has furnished information to us many times in the past (R. 15) . . . and it was always accurate (R. 8 & 15) . . . the informer told us the defendant had committed and was committing a crime (R. 9 & 15) . . . the informer's tip was our sole reason for arresting the defendant (R. 14 & 18) . . . while the informer has given us this information many times in the past he has never appeared once in any court" (R. 15 & 18). Why has he never appeared? Because, "there never has been any need" (R. 18).

And, there will be *no* post-arrest check by the judiciary on any of this testimony. The courts will then become, in the words of *Aguilar* v. *Texas*, 378 U. S. 108, 111, "merely . . . a rubber stamp for the police."

Further than predicting the above "with absolute certainty" we cannot go because an informer's confidences are exclusively reserved for policemen. But we respectfully suggest that after attaining his present goal—the complete emasculation of the Fourth Amendment—the informer's

next step is readily discernible by any student of government.

This Court has determined that disclosure of an informer's identity will be required if, in fact, it is

> ". . . essential to the defense, as, for example, where this turns upon the officer's good faith." (Citations.) [*Scher* v. *United States,* 305 U. S. 251, 254, 83 L. Ed. 151, 154, 59 S. Ct. 174].

The validity of the arrest, and therefore the conviction, in the case at bar ". . . turns upon the officer's good faith". The informer, if he existed, should have been identified and produced. Identification here "turn[ed] upon the officer's good faith" as surely as it turned upon the F. B. I. Agent's "good faith" in *United States* v. *Pearce,* 7 Cir., 275 F. 2d 318, where the falsity of the agent's affidavit was exposed. In *Pearce,* the informer's identity was revealed and his relation, or lack of it, to the agent required a holding that the search warrant, valid on its face, was based upon an affidavit which was spurious and thus insufficient to establish probable cause.

Petitioner humbly begs your Honors to extricate from the hands of policemen the delicate function of determining probable cause, and revest it in the only depository which has ever proven itself worthy of its possession.

Federal Cases

As noted, *Roviaro* v. *United States,* 353 U. S. 53, stated that most of the federal cases dealing with an arrest without benefit of a warrant have required production of an informer whose communication purportedly served as the basis of probable cause for an arrest.

If the Court please, let us now examine some of those federal cases.

In *United States* v. *Blich*, 45 F. 2d 627, two federal prohibition agents received information from a "reliable informer" that the defendant at a certain time would be making a delivery of intoxicating liquor at a certain designated place on the same evening. This information was received between 4 and 5 o'clock on the afternoon of the day when such transportation was to take place, about 35 miles from the designated spot. The time of the predicted transportation was stated to be between 7 and 8 o'clock. The officers proceeded to the place and discovered the defendant driving a Ford car and they stopped him. Inquiry was made as to whether whiskey was being transported, and upon such denial of transportation by the defendant the officers testified they discovered liquor by looking into the automobile and by detecting an odor of whiskey. The defendant was arrested.

With regard to the feature of the case involving the refusal of the officers to give the name of their informer, the court stated:

> "... The only question here is as to whether or not, when the matter is presented to a court for the purpose of seeking a determination of whether, under all the circumstances, there was probable cause, this element of those circumstances may remain undisclosed. It is scarcely an answer to the proposition that an agent testifies that his informant was a reliable person, and that he believed the information so given, unless the court sitting in judgment may have the right to determine whether, under all the circumstances, such information was reliable and the agent was justified in

having such belief. A belief must or should rest upon a substantial basis. It is not a question of impugning the motives or doubting the honest belief of the agent in regard to the information which he may have received. It is simply requiring the witness to sustain his motives and his beliefs by all the evidence at his command. It is conceivable that a prohibition agent in the earnestness and eagerness of performing his duty might adopt very shadowy leads. But what is of greater consequence is that an ill-intentioned person might give an officer information which would in many instances lead to humiliation and vexation of the innocent automobile driver upon the public highway, and yet, with the failure to disclose the name of his informant, the prohibition agent would be safely ensconced behind his blanket testimony that he was informed by a reliable person." [45 F. 2d 627, 629.]

The Court of Appeals for the Third Circuit examined the problem in *Wilson* v. *United States*, 59 F. 2d 390. There the officer testified that he entered the premises of the defendant by means of a key furnished to him by a member of the Democratic League of Delaware. He was asked upon cross-examination, "who was the member", this question he refused to answer, and he was adjudged to be in contempt for his refusal. His refusal to answer was predicated upon the ground that the information had been confidentially given as an aid to crime detection. The Court held:

"It is the right and the duty of every citizen of the United States to communicate to the executive officers of the government charged with the duty of enforcing the law all the information which he has of the com-

mission of an offense against the laws of the United States, and such information is privileged as a confidential communication which the courts will not compel or permit to be disclosed without the consent of the government. Such evidence is excluded, not for the protection of the witness, but because of the policy of the law. (Citations.)

"There is, however, an exception to this rule or a modification of this general doctrine, in that it gives way to another doctrine of the law when the two conflict. A trial court must dispose of the cause before it. If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false or is essential to the proper disposition of the case, disclosure will be compelled. (Citations.)

"The question here at issue was whether the evidence secured by a search and seizure should be suppressed. The proceeding was ancillary to a criminal prosecution against the Delaware league. The witness had testified that he had procured access to the rooms of the league on the invitation of a member, who had supplied him with a membership card; a key, and a plan of the building. If these means of access had not been supplied by a member, but had been unlawfully obtained, the evidence secured should be suppressed. Fraternal Order of Eagles v. United States (C. C. A.), 57 F. (2d) 93. To determine this, the information sought could not be withheld. The evidence was 'essential to the proper disposition of the case', and, in consequence, admissible, and, being admissible, the witness could not withhold it. Upon his refusal to testify he was properly adjudged to be in contempt, and an order of commitment properly followed." [59 F. 2d 390, 392.]

Mr. Justice Bazelon made the following analysis of the issue in *Jones* v. *United States*, 266 F. 2d 924:

> "The exigencies of law enforcement require that a police officer be permitted to make an arrest when he has probable cause to believe a person guilty of a felony. Ordinarily he must present what he knows to a magistrate on an application for a warrant, so that the decision whether or not to arrest may be made as judiciously as possible. But, when circumstances preclude this judicious procedure, the police officer may make his own determination of probable cause, subject to later judicial testing. This represents a compromise with principle, based on the assumption, not always correct, that when the objectivity of a magistrate cannot be brought to bear, a police officer sworn to uphold the law may be relied upon to act judiciously in abridging an individual's liberty. This compromise, which is dictated by necessity, transfers from the judicial officer to the police officer the delicate judicial function of determining in the first instance, whether there is probable cause. The dangers are plain. They would be increased beyond limits tolerable in a free society if the law allowed the police officer to arrest solely on the basis of an informer's uncorroborated assertions. For this would give the *informer* the delicate function which the law generally reserves for the judicial officer and allows the police officer to exercise only in limited situations. The considerations which justify delegation of the judicial function to police officers do not justify a further delegation to their informants.
>
> "It is notorious that the narcotics informer is often himself involved in the narcotics traffic and is often

paid for his information in cash, narcotics, immunity from prosecution, or lenient punishment.

* * * * *

"The reliability of such persons is obviously suspect. The fact that their information may have produced convictions in the past does not justify taking their reports on faith. Like the roundly condemned ancient practice of approvement, the present informer practice amounts to condoning felonies on condition that the confessed or suspected felon brings about the conviction of others. Under such stimulation it is to be expected that the informer will not infrequently reach for shadowy leads, or even seek to incriminate the innocent. The practice of paying fees to the informer for the cases he makes may also be expected, from time to time, to induce him to lure non-users into the drug habit and then entrap them into law violations.

"For such reasons, the law has wisely circumscribed the use of informers' reports as a basis for making arrests. It has required a showing of reliability of the information and some corroboration by facts within the arresting officer's own knowledge. Such corroboration may be obtained by placing the suspect under surveillance and observing whether his behavior—e.g., making contact with persons known to be in the trade, or surreptitious passing of a package—tends to support the informer's story.

"How much personal knowledge the policeman must have before making the arrest cannot be determined for all cases. Since circumstances vary, the rule must be stated in terms of what is reasonably inferable from the particular circumstances by a prudent police officer.

* * * * *

"When deprivation of liberty by arrest is justified by a combination of an informer's report and a policeman's own observations, the less the policeman is required to observe, the more significant becomes the informer's report. Since observation of so commonplace an act as coming home by train is enough, in combination with the report of an informer, to justify an arrest, the only significant limitation of the informer's power to cause an arrest is the requirement of reliability. The requirement that the informer be reliable stands as the only effective legal safeguard against false denunciations by irresponsible individuals who may be motivated by self-interest, spite, or even paranoia. The only other safeguard which remains rests not on law but on the good will of the police officer.

"To give vitality to the requirement of reliability the law requires, if no probable cause exists without the information from the informer, that his identity be divulged, so that his reliability may be subjected to meaningful judicial scrutiny rather than accepted on a policeman's word. Roviaro v. United States, 1957, 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639.

* * * * *

"It is easy to argue that the informer's reliability is established by the fact that the petitioner really did have narcotics in his pocket when he was arrested. But it is too well established for argument that the validity of an arrest cannot be proven by its fruits. A police officer may not make an arrest on the basis of information supplied by an informer unless he has reason to believe that on a post-arrest judicial test

the informer's report can be shown to have been reliable when the officer acted on it. This is not a technical rule designed to shield the relatively few persons who are ultimately charged with crime; it is designed for the protection of the many whom the police arrest but do not charge. There is reason to believe that for every illegal arrest that produces evidence leading to prosecution, there are many which produce nothing, so that no charges are made and the arrests never come to light. The many innocent persons thus arrested have no effective recourse against anyone for the deprivation of their liberty. The law recognizes that the only way to protect the innocent is by imposing safeguards which protect the guilty as well. Weeks v. United States, 1914, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652.

"Under the principle of Roviaro, the District Court could not properly determine that there was probable cause for petitioner's arrest without requiring disclosure of the identity of the informer whose report was claimed to constitute such cause. Nothing in Draper suggests that the Court has abandoned the Roviaro principle. Indeed the Court pointed out in Draper that the identity of the informer was disclosed. The treatment of the requirement of corroboration in Draper suggests that the Roviaro principle must be strictly enforced."

Recently (1961), in *Cochran* v. *United States,* 291 F. 2d 633, the Eighth Circuit examined the problem. In *Cochran,* the defendant was convicted of robbery. His conviction was partly based on the use in evidence against him of a

gun seized at the place of arrest. Before the trial, the defense made a motion to suppress the gun as evidence. The testimony was that a Savings and Loan Association was held up on May 27, 1960; the defendant was arrested in an apartment on June 6, 1960. The apartment in which the arrest occurred was searched with no warrant of any kind, and a gun found in the apartment was subsequently introduced in evidence as the one used in the robbery. The officers testified that they were acting upon information supplied by a "confidential informer" to the effect that the defendant was "good for the hold-up". The informer allegedly also told them the approximate location of the defendant's residence, and that he had a car of the type they were looking for. This information was given to the detectives several days prior to the actual arrest. It was the government's contention that there was probable cause under *Draper* v. *United States,* 358 U. S. 307, and *Jones* v. *United States,* 362 U. S. 257. At the hearing on the motion to suppress, the District Court refused to allow the unnamed informer to be disclosed.

Judge Vogel, speaking for the Court of Appeals, compelled disclosure.

In 1962, the Ninth Circuit required disclosure in the case of *Costello* v. *United States,* 298 F. 2d 99. There the defendant was allegedly engaged in narcotic trafficking in Alaska. Two packages of marijuana were seized and introduced into evidence. The officer testified that they had received a tip from an informer, but refused to disclose the name of the alleged informer. To quote Judge Orr:

> "The so-called 'informer's privilege' invoked to prevent disclosure of the identity of an informant, has been established in recognition of the need by law en-

forcement officials for sources of citizen information which will remain available only with some assurance of freedom from coercion or retaliation by persons ultimately brought to justice as the result of a 'tip.' This 'privilege' is not absolute, however, and occasionally the price of invoking it will be the dismissal of a case because of the inadmissibility of evidence—the source of which is not subject to challenge due to the invocation of the 'privilege.' The 'privilege' must give way when a challenge of the informant is essential to the proper disposition of the case. The determination of the validity of an arrest, search and seizure is essential to such a determination. Wilson v. United States, 59 F. 2d 390, 392 (3d Cir. 1932). The Wilson case was cited approvingly by the United States Supreme Court in Roviaro v. United States, 353 U. S. 53, 61, 77 S. Ct. 623, 628, 1 L. Ed. 2d 639 (1957).

• • • • •

"The customary check imposed upon arrest, search and seizure is the advance judicial check by the magistrate called upon to issue warrants. This check must occasionally yield to the necessity of quick action, in which case the magistrate's pre-arrest judgment is momentarily delegated to the enforcement officer who evaluates his basis for probable cause. The courts then exercise a post-arrest check on the actual existence of that probable cause. This latter check would not be effective if it looked no further than the uncorroborated tip of an anonymous informant. To stop the inquiry there, would be to delegate the usual advance judicial check not to the enforcement officer, but to the informant, and all with no ultimate judicial

check whatever. This cannot be done. Whether the issuance of a warrant by a magistrate at the pre-arrest hearing in primary reliance upon a tip would be proper, we need not decide, for other inherent safeguards present at such a hearing are obviously not present in a situation such as the instant one. See Jones v. United States, 362 U. S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). It is enough to observe that in this situation, a reasonable opportunity for the appellant to challenge the reliability of the informant must be permitted on the motion to suppress, or no real judicial check would ever take place. The refusal of the trial court, upon appellant's request, to require disclosure of the name of the informant under these circumstances was error." [298 F. 2d 99, 101.]

Very recently, in *United States* v. *Robinson,* 325 F. 2d 391 (2 Cir., 1963) a case greatly relied upon by the instant petitioner in the Supreme Court of Illinois, a similar problem was presented. In that case, Federal Agent Giovino allegedly received a telephone call about 9:30 A. M. September 17, 1962, from a "special employee of the government" who informed him that the defendants would be arriving that day from New York with narcotics, but that he did not know how they would be travelling. Giovino then telephoned this information to Detective Gavin in Buffalo, who immediately relayed the information by telephone to Officer Clohessy of the Narcotic Squad, who was in a police car with Officer Quale. Gavin told Clohessy that the defendants were expected to return to Buffalo that morning with narcotics and directed the officer to apprehend the defendants near their home at a certain street. About 10:40 A.M. Clohessy and Quale saw Robinson and

Daniels, the defendants, walking toward their home which was about three and one-half blocks away. They were carrying suitcases. Daniels knew Quale as an officer of the narcotics squad as he had been to her home a couple of times. Both Quale and Clohessy testified that they knew Daniels to be an addict. Quale also knew of Robinson's previous convictions for possession and sale of narcotics. When Quale asked what they were doing with the suitcases the defendants said they had come from New York, and had just gotten off the bus. Daniels was subsequently found to have narcotics in his possession and Robinson's suitcase contained narcotic paraphernalia.

At the hearing Giovino testified that he had received the confidential information, and that at some later time the "special employee" had been paid by the government. Defense counsel then asked the witness to state the special employee's name, the U. S. Attorney objected, and the court sustained the objection. The court held as follows (325 F. 2d 391 at 393):

> "Clearly it was error to cut off the examination at that point and refuse to the defense the only means of testing the fact of receipt of such information, the means of the informant's knowledge and the reasons why Giovino considered it to be reliable.
>
> "Without the information that Robinson and Daniels were coming back from New York with narcotics there would have been no probable cause for Quale and Clohessy to believe, when they saw Robinson and Daniels carrying suitcases toward their home, they were transporting narcotics. Thus it became central to the inquiry regarding probable cause that Giovino had in

fact received some information prior to the arrests from someone who was in a position to know whereof he informed. The defendants were not required to take Giovino's word for this. They had the right to elicit all relevant facts so that the judge, rather than Giovino, could pass upon whether probable cause existed at the time of the arrests. To hold that the agent was not subject to further examination on the crucial facts regarding the informant would completely emasculate the requirement of probable cause where officers of the law act without a warrant. Such decisions should not be left in the hands of law enforcement officers who may later be called upon to justify their action; they may safely be left only in the hands of some impartial judge or magistrate.

"As there was not sufficient evidence apart from the special agent's information on September 17 to justify arrest, the identity of the informant must be disclosed.

* * * * *

"Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959), is clearly distinguishable on its facts. There the Supreme Court upheld an arrest without a warrant under very similar circumstances. The 'special employee' had advised the narcotic agent that the defendant would be arriving by train and that he would be carrying narcotics. However, in Draper the identity of the informer was disclosed. It also appeared that he had given 'accurate and reliable' information on previous occasions. 358 U. S. at 313, 79 S. Ct. at 333.

* * * * *

"Usually the government is able to secure additional corroborating information so that the arrest may be supported by that other evidence, and in such cases, of course, the arrest should be sustained without requiring the disclosure of the informant. However, where it is essential to the proper determination of the validity of an arrest the government must either disclose or run the risk of having the arrest held invalid.

* * * * *

"Accordingly, we vacate the judgment of the district court and remand the case for further hearing on the motion to suppress, which hearing should be confined to the identity of the special agent and his reliability as it relates to the issue of probable cause."

The same Second Circuit Court relied upon *United States* v. *Robinson*, 325 U. S. 391, in *United States* v. *Elgisser*, 334 F. 2d 103 (1964). There, the defendant was convicted of knowingly possessing goods stolen from an interstate facility, and the question of reliability again came up. The court held that disclosure would not be required because the arresting agents at the time of the arrest had before them more than merely a tip that the truck to which they had been directed to keep a watch contained the stolen goods. But the court affirmed *Robinson* stating:

"Only information from a reliable informer will suffice to establish probable cause, see Draper v. United States, 358 U. S. 387, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959), and for this reason an accusation by an informer cannot itself furnish probable cause where arresting agents have 'no basis in experience for confidence in the reliability' of the informer's information. *Wong Sun* v.

United States, supra, 371 U. S. at 480, 83 S. Ct. 407, 413. Moreover, where information received from an informer is essential to the establishment of probable cause, his name may not be withheld from the judge or magistrate whose duty it is to determine whether the probable cause requirement had been met. *United States* v. *Santiago,* 327 F. 2d 573 (2 Cir. 1964); *United States* v. *Robinson,* 325 F. 2d 391 (2 Cir. 1963). As we said in the *Robinson* case, decisions as to the reliability of informers who have been furnished information used to make an arrest 'should not be left in the hands of law enforcement officers who may later be called upon to justify their action; they may safely be left only in the hands of some impartial judge or magistrate.' (325 F. 2d at 393.)

In this case the only evidence on the issue of the previous reliability of the informer was the opinion of FBI agents that the informer was reliable. Agent Martin, who, it appears from the record was the testifying agent who knew the most about the informant stated that he believed the informant to be reliable but admitted that he did not know who the informer was. It would seem that if the burden of establishing probable cause is in truth to be placed on the Government in these cases, and if the existence or absence of probable cause is in fact to be determined by an impartial judge or magistrate, then, where the existence of probable cause depends solely upon the reliability of an informer, the Government must be required to do more than establish that, in the opinion of the agents directing or participating in the arrest, the informer was reliable, or that in the agents' opinion information

furnished by the informer in the past had been found to be reliable, whatever that may mean to them. The Government, in order to carry its burden of proof on the issue of probable cause, at least ought to be required to name the informer and to indicate what information the informer has furnished in the past, and with what results. Otherwise, the finding of the existence or absence of probable cause in a case where the reliability of the informer is at issue will not depend upon the considered judgment of an impartial judge or magistrate, but upon the judgment of law enforcement officers involved in the arrest.

Here, however, the arresting agents, at the time of arrest, had before them more than a tip that the truck on which they had been directed to keep a watch contained stolen goods."

One of the cases relied upon by Mr. Justice Schaefer in his dissent in *People* v. *Durr*, 28 Ill. 2d 308, 192 N. E. (2) 379, discussed below, was *United States* v. *Keown*, 19 F. Supp. 639. In that case, the defendants were indicted for the illicit possession of whiskey. They moved by timely motion to suppress the evidence on which the indictment had been obtained. A federal agent testified that the defendant was known to him as a "bootlegger" and had previously been arrested. The witness further testified that 2 or 3 days before the defendant was arrested a person with whom he was well acquainted, and who had theretofore given him similar information which he also found to be true, informed him that Keown would transport over a certain highway about April 21, 1937, moonshine liquor in a 1936 Ford, license #295-M-6.

On the date in question, while travelling along the highway, the detectives passed the car bearing that license. The officers testified that they pursued the car and saw some covered objects in the rear of the car. The car was heavily loaded, going at a rapid rate of speed, and the agents compelled the driver to stop, searched and found illegal liquor. The federal agent was asked by the defense counsel on cross-examination the name of his informer, he refused to answer, and the court ruled that he was not required to disclose the name of the person who had given him the information concerning the defendant's violation of the law. Relying upon *U. S.* v. *Blich*, 45 F. 2d 627 (*supra*), court reversed, holding:

> "In the case here under consideration, the officers making the search and arrest knew the reputation of one of the defendants arrested to be that of a dealer in illicit liquor, but did not know where the defendant would be or what kind of car he would be using on the day of the arrest, but for facts furnished him by the informer.
>
> If the information of the informer was unreliable or he was unworthy of belief the officer did not have probable cause to make either the search or the arrest. It follows that the court must have all the facts before it can properly determine whether the officer acted on reasonable grounds. If an officer should stop a peaceful, law-abiding citizen on the highway and search his car, subjecting him to humiliation and ridicule, and the offended citizen should seek redress by a suit for damages, surely no court would say the officer would be relieved of responsibility by an answer that he was informed by a reliable person that the citizen was

engaged in the illicit liquor traffic, but he could not and would not disclose the name of his informer, thus preventing a fair and impartial investigation of his conduct. The certainty of the law is one of its greatest attributes. We cannot have one law applicable to an identical state of facts for the innocent and another for the guilty. The guilty may sometime escape under such a rule, but this need not follow if the officer be diligent, and likewise the secrets of state may be kept inviolate. The officer may use the facts furnished by the informer as a basis for his own investigation and discover sufficient facts to search or arrest without disclosing the source of his information." (19 F. Supp. 639, 645.)

* * * * *

"Every accused person has the right to cross-examine on material facts every witness who testifies against him. This has been the rule ever since the law became certain and stabilized, and is a part of due process, which found its expression in the Fifth and Sixth Amendments to the Constitution. See Hale's History of the Common Law, page 1145; Starkie on Evidence (2d Ed.) Vol. 1, page 160.

When the government calls a witness whose testimony is based in part on that of an informer, it subjects the witness to cross-examination and the informer to whatever peril may arise out of such cross-examination. It is a sound rule to keep secret information furnished to the state of violations of its laws, but this commendable public policy must yield to a higher, or at least an equal, right accorded to an accused to have a court investigate the facts material

to his offense in a criminal prosecution, and sometimes the departments of government will be put to a choice of either foregoing a criminal prosecution or disclosing the source of material information necessary to the conduct of orderly judicial procedure.

* * * * *

The better way to reach the question is to compel the United States to forego the use of the testimony by the agent favorable to it, unless willing to submit to a full cross-examination." (19 F. Supp. 639, 646.)

Also relying upon *U. S.* v. *Robinson*, 325 F. 2d 391 quoted above, the U. S. District Court for the Southern District of New York, went one step further than mere name identification. In *United States* v. *Goss*, 237 F. Supp. 26, the defendant was charged with violations of federal narcotics laws. Agent Manley testified on the motion to suppress evidence that he received a telephone call about 2 P. M., April 22, 1964, from an informer who told him that Goss was going to meet someone about 5 P. M. at a certain address and was going to get some narcotics from the person to be met. The informer gave the name of Goss, plus a physical description, and a description of the clothes Goss was wearing that day. The agents drove to the stated address, and about 5 P. M. they saw a man answering the description of Goss walking down the street, saw him meet another man in middle of block, and saw the other man hand Goss a newspaper. Goss walked away and began to enter an automobile at which point he was arrested and in the newspaper heroin was discovered.

Upon questioning by defense counsel, Agent Manley testified, without objection by the government, that the

name of the informer was Patrick Gonsalves; he also described Gonsalves and testified to his reliability. He further testified that at one time the informer had a house on a certain street. Agent Manley was asked if he could obtain the present address and telephone number of the informer, and he said that he could.

The court then ordered the information to be furnished to counsel for the defense, and there was an adjournment for the purpose of giving the government time to furnish the said information. When the hearing resumed 14 days later the government took the position that they had discharged their obligation by giving the name of the informer, and declined to give his address and phone number. Judge Wyatt held this insufficient [237 F. Supp. 26, 28].

> "This is an obvious case where 'disclosure of an informer's identity * * * is essential to a fair determination of a cause' and where accordingly 'the privilege must give way'. Roviaro v. United States, 353 U. S. 53, 60-61, 77 S. Ct. 623, 628, 1 L. Ed. 2d 639 (1957).
>
> There is no question involved as to production of the informant nor as to requiring the government to go out and obtain information for defendant.
>
> The sole question is whether the government, in order to enable defendant to locate the informer, must give his present address and telephone number—information which the government is assumed, from the record, to have.
>
> There can be but one answer to this question and that answer is 'yes'.

The normal privilege of the government is to withhold the identity of an informer. Once this privilege has been found not to exist—as in the case at bar—the government must identify the informer, that is, give such identifying information as will reasonably enable defendant to find the informer so as to be able to interview him in preparation for trial, to call him as a witness at trial, or—as in the case at bar—through him to test whether there were 'reasonable grounds' for the arrest. Where the privilege does not exist, as here, there is no room for any argument for the government that it has an obligation 'to protect an informant from harassment and reprisals'.

The leading case, Roviaro, does not refer merely to naming the informer. The opinion speaks always of the 'identity' of the informer and makes it clear that this means more than the mere name. For example, in Roviaro there had been a motion by defendant before trial for a bill of particulars as to the 'name, address, and occupation' of the informer (353 U. S. at 55, 77 S. Ct. 623). The motion had been denied. The Supreme Court held this to be error. The Supreme Court said that 'when his name and address were thus requested, the Government should have been required to supply that information or suffer dismissal of that count' (353 U. S. at 65, footnote 15, 77 S. Ct. at 630).

It will be seldom that a name alone is sufficient to identify an informer."

California State Cases

The State of California has been confronted with the same problem—disclosure of an informer whose purported communications serve as a basis for an arrest—in a series of cases beginning with *People* v. *Alanis,* 309 P. 2d 71 (1957). In that case, the defendant was indicted for the unlawful possession of heroin. At the hearing, the arresting officer, Officer Smith, testified that on various stated dates before the arrest he received detailed information about the defendant from no less than four informers (referred to as informers A, B, C, and D); that their information had always been reliable; and that, in substance, they told the officer that the defendant possessed and dispensed narcotics at a certain address and in a certain car.

Smith testified that he went to the described house, saw the described car, saw a man who said he was Johnny, and arrested him. The house was searched and narcotics seized. The trial court refused to require the police officers to identify the informers. Holding this ruling to be error the District Court of Appeal affirmed. But Mr. Justice Vallee wrote such a well-reasoned dissent that it bears quoting in the instant brief, inasmuch as his dissent paved the way, as we shall see, to the overturning of this doctrine of nondisclosure by the Supreme Court of California in *Priestly* v. *Superior Court,* 330 P. 2d 39 (*infra*). Here is, in part, Mr. Justice Vallee's dissent:

> "The authorities are legion that it is for the court, not the witness, to determine whether the communications were made in official confidence and whether the public interest would suffer by disclosure. There was no evidence as to how the public interest would suffer—only

the opinions of the officers. Testimony of a police officer that such a person is reliable is a pure conclusion of the officer. It is strange indeed that in practically all the cases reaching the reviewing courts in recent months involving the lawfulness of the arrest or of a search, the basis of the arrest or search was either wholly or in large part information received from anonymous informers. As counsel for defendant put it below, 'since the exclusionary rule came into effect there has been almost an identical pattern of testimony by police officers as to their reasons for making the arrest'. If it is the law that an arrest is lawful if made solely on information received from informers and that the names of the informers need not be disclosed, People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905, might just as well not have been written.

Defendant contends that by calling the officers and having them testify to information they claimed they had received from the informers, the prosecution waived any right to foreclose the defendant from ascertaining the names of the informers on cross-examination. The prevailing opinion does not discuss the point, nor was it considered in the cases cited in that opinion. The point is good. Where an officer testifies he obtained information from an informer and what the information was, he thereby waives any right to refuse to disclose the name of the informer. On disclosure the defendant has the right to subpoena the person named and ascertain his version of the facts (309 P. 2d 71, 83).

• • • • •

My position in this respect is that the prosecution, having called the officers to whom the communications are said to have been made and required them to state what the communications were, thereby waived the privilege and subjected the officers to cross-examination on the subject-matter of the communications, including the names of the persons by whom they were made. The prosecution could not require the officers to disclose as much of the matter as was helpful to it, and then shut the door as to any further inquiry by the defendant relating to the communications. Having required a partial disclosure, or rather one substantially covering the entire matter, it waived its privilege, and the defendant became entitled to a full disclosure.

The communications, to the extent they were given, were important evidence for the prosecution; in fact they were the only evidence bearing on the legality of the arrest, i.e., whether the officers had probable cause for making the arrest—a vital issue in the case. The evidence which the officers gave may or may not have been truthful; they may or may not have received the communications; and if they received them, they may not have been obtained from persons worthy of credit; if they were not received from persons worthy of credit, it could have been found that the officers acted without probable cause in making the arrest; and if the names of the characters said to have made the communications had been given and one or more of them had been called as a witness and denied making the communication, it might reasonably have been found the communications were not made, that probable cause for the arrest did not exist. In the only

California case which has come to my attention in which the alleged informer was identified by the officer, he (the alleged informer) was called by the defendant and testified he had not given the officer any information. People v. Lunbeck, 146 Cal. App. 2d 539, 303 P. 2d 1082. Certainly a defendant in a criminal action should not be precluded from rebutting the testimony of the officer and thus let the court determine the fact. As Wigmore, referring to the privilege, puts it, 'It is not to be both a sword and a shield', 8 Wigmore on Evidence, 3d ed., 830 ¶2388.

The privilege of a defendant in a criminal action to confrontation by the witnesses against him in the presence of the court is protected by the due process clause of the federal and state Constitutions. Snyder v. Com. of Massachusetts, 291 U. S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674, 678, 90 A. L. R. 575. The denial of the right of cross-examination is a denial of due process."

People v. *Alaniz,* 309 P. 2d 71, was decided in March, 1957, by the California District Court of Appeal, Second District. In December, 1957, the First District decided contrarily in *Priestly* v. *Superior Court,* 319 P. 2d 796. There, also, the police officer testified he received information that the defendants were in possession of narcotics but refused to disclose the source of his information.

The court, in holding this to be error, said:

"The question is not whether the facts told the police by the informer were true, but whether the police reasonably believed them to be true. The police attempted to meet that requirement by testifying that they believed the informer because as a result of past

experience they had found the informer to be 'reliable'. In the instant case the past experience with the informer was extremely limited, but it can be accepted that it was sufficient to warrant the police in acting upon it. Thus, the police were told that a felony was being committed by defendant, and reasonably believed the information. This means that prima facie the police had probable cause to make the arrest and search without a warrant.

But upon proper request the police refused to divulge the name of this informant. How could the accused meet the prima facie case? The federal and state Constitutions guarantee him freedom from illegal searches and seizures. Since the Cahan case, illegally secured evidence cannot be introduced against him. The police were relying solely on the information secured from an informant to justify the arrest and search without a warrant. If the accused could prove that the informant did not exist, or, if he did exist, that he did not tell the police the facts that they claim were told to them, then the sole basis for the arrest and search would have disappeared, and the arrest and search would have been clearly illegal, and the evidence secured by such means would not have been admissible. But the accused was prevented from presenting such evidence. He was told by the court that public policy prevents the disclosure of the identity of the informant. Thus he was deprived of the right of confrontation and the right of cross-examination. He could not, in the nature of things, prove either that the informant did not in fact exist, or, if he existed, that he did not tell the officers what they claimed was told them. These are important rights. The pub-

lic policy that supports the nondisclosure of the identity of the informer comes into direct conflict with the constitutional and lawful rights of the accused. Which shall prevail? That is the question." (319 P. 2d 796, 800.)

The Court answered its own rhetorical question, first by citing and quoting many authorities on the question and then narrowing and defining the issue as follows (319 P. 2d 796, 802):

"This brings us to the precise problem now before the court, namely, at the preliminary hearing, when it develops that the sole basis for the search without a warrant is information received from an informer, and there is no emergency, must the name of the informer, if known, upon request, be divulged or the evidence suppressed?

Logic, fair play, and fundamental principles of law suggest the answer. If the reasoning in the informant-participant cases is sound, and we submit that it is, then the same rule must apply to the problem under consideration. Every reason given to support the rule in the informer-participant cases applies with equal force to this situation. The rule of the Cahan case holds inadmissible evidence secured by an illegal search and seizure. At the preliminary hearing an officer can justify an arrest and search without a warrant only if he has reasonable grounds to believe a felony has been committed. When the sole basis for such belief is information secured from an informer claimed to be reliable, the identity of the claimed informer becomes of vital importance to the accused.

It might be that the informer, in fact, does not exist. Certainly, the accused is not bound by the officer's statement that he does. An officer who believes that the end justifies the means, and who does not agree with the Cahan case, could vindicate any arrest and search, however unlawful, if the identity of the informer need not be divulged. In that event the rule of the Cahan case would be subverted. As long as the possibility of a 'phantom' informant exists, it should and must be guarded against. Moreover, the informer may not have told the officer the facts the officer states were told him, or the officer may have had no real reason to believe that the informer was reliable. It is not beyond the realm of reasonable possibility that an officer, eager to carry out his duties, will follow up a lead that clearly would not constitute reasonable and probable grounds for searching without a warrant. After the arrest is made and incriminating evidence has been found, an over-zealous officer might well rationalize that society should be protected from the guilty criminal, and thus justify in his own mind the distortion of the actual facts told him by the informer. The possibility may be remote, but it exists. Certainly, the presumption that official duty has been performed does not prevent the impeachment of the officer. As was said in Powell v. Superior Court, 48 Cal. 2d 704, 707, 312 P. 2d 698, 699, in discussing a somewhat related problem: 'In the circumstances of the present case, to deny inspection of defendant's statements would likewise be to lose sight of the objective of ascertainment of the facts, and would be out of harmony with the policy of this state that the goal of criminal prosecutions is not to secure a con-

viction in every case by any expedient means, however odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike.'

The defendant has a legal right to be confronted by his accuser, and to cross-examine him if desired. To deny him these rights, and thus to prevent him from introducing, if he desires, relevant testimony, is to deny him due process of law.

* * * * *

In the present case, the court, in refusing petitioner, upon proper request, the name of the informer, exceeded its jurisdiction. The court had jurisdiction to hold the accused to answer only if the legally admissible evidence showed probable cause that a crime had been committed. In the instant case, the narcotics seized in the search were not admissible unless the search was legal. To justify the search without a warrant it was indispensable for the police to prove that they had reasonable grounds to believe that a felony had been committed. When they relied solely on an informer (and there was no emergency), and then claimed a privilege against divulging the name of the informer, the evidence of the facts secured from the informer should have been stricken. If that had been done there would have been no evidence to justify the search. Without such evidence, the narcotics seized in the search could not have been properly admitted into evidence. Thus, if the accused's constitutional rights of due process had not been violated, there would have been no evidence at all of probable cause. Without such evidence the court exceeded its jurisdiction

in holding him to answer. These are not novel principles.

* * * * *

The rule here announced should impose no unfair restraint on proper law enforcement. It is important to society, of course, that the narcotic trade be suppressed. But it is also important to society that all those accused of crime, including those accused of narcotic violations, be afforded a fair hearing and a fair trial. The Cahan case helps to assure the accused of such a hearing and such a trial. The rule of that case is sound. The courts should not permit it to be undermined by unsound exceptions. In our constitutional and democratic society it is most important that the constitutional and civil rights of all people, including the lawbreaker, should be protected. The doctrine that the end justifies the means should have no place in law enforcement, and should certainly not receive judicial approval. It cannot be true that the only way to enforce the law is to break it—that in order to catch the lawbreaker it is necessary to infringe his constitutional and civil rights. The use of informers plays an important and proper place in law enforcement. The privilege of withholding the identity of informers is also most important. But an abuse of the privilege by infringing on the rights of the accused should not be condoned. The rights of confrontation, of cross-examination, of preparing a defense, and of a fair trial generally, are too important to permit them to be frittered away by over-zealous law enforcement officials."

As noted, the Supreme Court of California redecided the issue in this case. In a typically well reasoned opinion by Mr. Justice Traynor, the court declared that disclosure or dismissal of the prosecution would be the rule.

It is worthy of note that Mr. Justice Schaefer of the Illinois Supreme Court, in his dissent in *People v. Durr*, 28 Ill. 2d 308, 192 N. E. 2d 379, 384 (*infra*), relied upon and quoted extensively from Mr. Justice Traynor's opinion in *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P. 2d 39 (1958). Here, in part, is Mr. Justice Traynor's opinion:

> "If testimony of communications from a confidential informer is necessary to establish the legality of a search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's action depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue. Such a requirement does not unreasonably discourage the free flow of information to law enforcement officers or otherwise impede law

enforcement. Actually its effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search. Such a practice would ordinarily make it unnecessary to rely on the communications from the informer to establish reasonable cause. When the prosecution relies instead on communications from an informer to show reasonable cause and has itself elicited testimony as to those communications on direct examination, it is essential to a fair trial that the defendant have the right to cross-examine as to the source of those communications. If the prosecution refuses to disclose the identity of the informer, the court should not order disclosure, but on proper motion of the defendant should strike the testimony as to communications from the informer.

* * * * *

In sum when the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be struck on proper motion of the defendant." (330 P. 2d 39, 43.)

The same reasoning, in somewhat different language, was stated by Mr. Justice Dooling in *People* v. *McShann*, 321 P. 2d 533 (1958)

"It seems obvious that the same principles of fair play which require the disclosure of the identity of the informer when his testimony might be of material benefit to the defendant in defending the case against him on the merits should be equally applicable when the

informer's testimony might be of material benefit in establishing that the officers did not have reasonable grounds to justify an arrest and search without a warrant. It is just as important to a defendant to have access to material witnesses who may satisfy the court that evidence against him should be excluded because it was obtained as a result of an illegal search and seizure as it is to have access to material witnesses who may give evidence which will result in overcoming in the eyes of the jury the prosecution's evidence against him on the merits of the charge."

Accord: *People* v. *Robinson*, 330 P. 2d 120, where at page 124 the court stressed the importance of the rule that judicial matters must be decided by, and kept within the confines of the judiciary:

"It must be borne in mind that the trial court and not the police officer must determine whether the latter's action is based upon probable cause, and when he testifies that he based the legality of an arrest on information given by a confidential informant, the court in deciding that probable cause existed for the arrest must find that the informant was reliable, the officer relied upon his information and the officer is telling the truth."

The above stated law was adhered to by the courts in *People* v. *Chatman*, 333 P. 2d 347 (Cal., 1959); *People* v. *Gutierrez*, 341 P. 2d 54 (Cal., 1959) and *People* v. *Garrett*, 47 Cal. Reptr. 194 (1965); Extended quotations therefrom would be merely repetitious.

As recently as May 26, 1966, in *Martin* v. *Superior Court*, 51 Cal. Reptr. 567, the California District Court of Appeal

declared unconstitutional a statute which vested in a judge or magistrate discretion as to whether disclosure of the name of an informant would be required. The court reasoned that such discretion deprived a defendant of his constitutional right to due process of law, on the question of probable cause, and thus was unconstitutional.

New York State Cases

In *People* v. *Malinski*, 15 N. Y. 2d 86, 204 N. E. 2d 188, a trailer containing 1,298 cartons of drugs was stolen from a terminal in Boston, Massachusetts. Three days later the police, acting pursuant to a search warrant, seized the cartons from a warehouse. The judge who heard the motion to suppress determined that the search warrant was improperly executed, but ruled that the seizure could be upheld though made without a warrant, if the officers had probable cause to arrest the defendants. Thereupon, a hearing was conducted before another judge to determine whether there was probable cause to make the arrest. At the hearing, one Officer Sullivan testified that two days before the arrest he was told by an unnamed informant, whose tips, according to Sullivan, had "proved correct" on other occasions, that there was stolen goods in that building, and that Malinski and another were "involved". He further testified that after receiving such information the police returned to the building, and there saw the defendants and a large quantity of cartons. It was the defendant's position that Sullivan's informer was non-existent and that the police had actually acquired their information by use of a wiretap. The court refused to allow the defense to question Officer Sullivan about the informer.

The court, citing *Draper* v. *U. S.*, 358 U. S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, held that the requisite probable cause was present:

> "But this is not decisive of the question we are considering. The finding of probable cause necessarily rests upon acceptance of Sullivan's credibility; and the conclusion (from the present record) that there was probable cause does not resolve the defendants' claim that they were denied a fair hearing because, by withholding the informer's identity, the State deprived them of the only available method of rebutting Sullivan's testimony—testimony, so essential, the defendants' , that without it a finding that probable cause existed would not be justified." (204 N. E. 2d 188, 192.)

In *People* v. *Yen Dong*, 263 N. Y. S. 2d 102 (1965) the defendant was charged with possession of narcotics. At the hearing on the motion to suppress the arresting officer testified he had received a telephone call from a reliable confidential informant who had told him that a male Chinese, describing his clothing, was sitting in front of a certain address with two shopping bags, and pretending to sell vegetables, but was actually trafficking in narcotics. The officer testified he immediately went to the place, saw the said person so described, arrested him and seized heroin from his person. Relying upon *People* v. *Malinski*, 15 N. Y. 2d 86, 204 N. E. 2d 188 (*supra*), the court held that production of the informer would be required.

Sundry State Cases

In *Smith* v. *State*, 169 Tenn. 633, 90 S. W. 2d 523 (cited by Mr. Justice Schaefer in his dissent in *People* v. *Durr*, 28 Ill. 2d 308, 192 N. E. 2d 379, 384) the court held disclosure would be required.

> "So we think, when an officer seeks to justify an arrest upon a charge made upon reasonable cause, the officer should be required to reveal the identity of the person making the charge as well as the nature of the charge. The court has to pass upon the officer's justification, and that justification is open to impeachment. A defendant should not be bound by the officer's statement that a charge had been made, and unless the source of the charge was ascertained, neither its good faith nor reality could well be challenged. An unscrupulous officer, upon a fictitious story of 'a charge made', might vindicate any arrest, however unlawful, if there could be no further inquiry." (90 S. W. 2d 523, 524.)

Accord: *State* v. *Edwards*, —— Mo. ——, 317 S. W. 2d 441 (1958); *State* v. *Cookson*, —— Mo. ——, 361 S. W. 2d 683 (1962); *Crosby* v. *State*, 90 Ga. 63, 82 S. E. 2d 38 (1954); *Drouin* v. *Maryland*, 222 Md. 271, 160 A. 2d 85 (1960).

Mississippi, a State generally not otherwise noted for its liberality, requires disclosure of the identity of an informer whose purported communications are alleged by the arresting officer to be the basis of probable cause. See: *Mapp* v. *State*, —— Miss. ——, 114 So. 825 (1927); *Hill* v. *State*, —— Miss. ——, 118 So. 539 (1928); and *Ford* v. *City of Jackson*, —— Miss. ——, 121 So. 278 (1929).

Illinois Decisions

Now, if this Court please, attention at this point is invited to the holdings of the courts of review of the State of Illinois. A brief summary of these cases should illustrate how deeply the concept of nondisclosure has become entrenched in this State. It is a pseudo concept which, like a malignant growth, should be rooted out before it destroys the judicial organism.

Over the dissent of Mr. Justice Schaefer and two other justices, the Illinois Supreme Court first held that production of an informer, whose communications are supposedly relied upon by the arresting officer to establish probable cause, will not be compelled when the arresting officer testifies that he received information previously from the same informer, and the information proved "reliable". *People* v. *Durr*, 28 Ill. 2d 308, 192 N. E. 2d 379. Carrying that proposition one step further the Court next held that an arrest is valid even though "the record contains no affirmative testimony as to the past reliability of the informer". *People* v. *Brooks*, 32 Ill. 2d 81, 203 N. E. 2d 882, 884. In fact, the Illinois Supreme Court had recently held that purported communications from an unproduced "reliable informer" constitute probable cause for an arrest without a warrant even though his previous communication about the same defendant was not reliable. *People* v. *Miller*, 34 Ill. 2d 527, 216 N. E. 2d 793. It is not even necessary in Illinois for the informer to have communicated directly with the arresting officer, but he may pass his "information" on through intermediaries. *People* v. *McFadden*, 32 Ill. 2d 101, 203 N. E. 2d 888. The communications from these unproduced informers will not only justify ar-

rests in public places, but may validly lead the warrantless officer to the confines of hotel rooms, and thus, presumably, private homes too. *People* v. *Carlton*, 58 Ill. Appl. 2d 163, 206 N. E. 2d 824, and *People* v. *Varnadoe*, 54 Ill. App. 2d 443, 203 N. E. 2d 781. Neither is production of the "reliable informer" required in Illinois where the purported hearsay communications to the police are denied under oath by the accused. *People* v. *McCray*, 33 Ill. 2d 66, 210 N. E. 2d 161 (the instant cause). Nor will the accused's request for an *in camera* hearing to determine the existence of the alleged informer be honored. *People* v. *Nettles*, 34 Ill. 2d 52, 213 N. E. 2d 536. Under Illinois law, the anonymity of these alleged privies to underworld secrets extends all the way from narcotics prosecutions (*supra*) to such other activities as prostitution, *People* v. *Jarrett*, 57 Ill. App. 2d 169, 206 N. E. 2d 835; gambling, *People* v. *Williams*, 27 Ill. 2d 542, 190 N. E. 2d 303, and the sale of firecrackers, *People* v. *Brooks*, 67 Ill. App. 2d 479, 214 N. E. 2d 498.

Not only is "Reliable" nondisclosable in his alleged communications with the police as he flutters about gathering tidbits of information (usually for pay), he is even allowed to maintain his secrecy, while perverting and prostituting a court document of such judicial sanctity as a search warrant, by signing a false and fictitious name to the affidavit for it. *People* v. *Pugh*, —— Ill. App. 2d ——, 217 N. E. 2d 557. And "Reliable" himself may surreptitiously furnish the actual contraband seized from the accused's home or person, and yet his identity will remain cloaked. *People* v. *Connie*, 34 Ill. 2d 353, 215 N. E. 2d 280, and *People* v. *Freeman*, 34 Ill. 2d 362, 215 N. E. 2d 206.

In the latter case, the arresting officer testified he received a telephone tip from a *male* "reliable informer" whom he had known for over a year and who had given him information leading to eight arrests. The Supreme Court of Illinois pooh-poohed the officer's previous testimony that the informer was a *female,* as merely "confusion" (215 N. E. 2d 206, 208).

And even in those few cases in Illinois where the informer has been required to testify in open Court he still may lurk in the shadows by giving a phony name, though his true name is sought in order to impeach him on prior inconsistent testimony given in another trial. Why? Because his true name might be of no use because the informer might have used a phony name in the other trial too! *People* v. *Smith,* —— Ill. App. 2d ——, 217 N. E. 2d 546.

The Courts have yet to spell out what they require within the framework of "reliability". Must the information previously given have related to crimes, or is it sufficient if "Reliable" was previously correct on the weather, travel directions, baseball scores, etc.? We are not told. But we are told that the information was always "reliable"—i.e. the police believed it.

If a myriad of warrantless searches are conducted which produce no "fruits", there is no record of it because the police only charge persons "caught with the goods", and police informers are always "reliable". If, by signing a fictitious name to an affidavit, or by filtering his "information" through a police officer, thousands of homes are searched in which nothing is recovered, there is no record of this either because the Illinois statutes provide that: "The Complaint on which the warrant is issued need not be

filed . . . with the Court . . . until the warrant has been executed . . . " Ill. Rev. Stats., 1963, Chap. 38, Section 108-4. And, of course, warrants are rarely, if ever, filed when nothing is found.

A beacon of fading hope, but brilliant logic, continues to shine forth: Mr. Justice Schaefer's dissenting opinion in *People* v. *Durr*, 28 Ill. 2d 308, 192 N. E. 2d 379, 382:

> "But even if the testimony of the policeman, standing alone, might have supported a finding that the informer was reliable, it was deprived of probative force by the fact that the defendant, on cross-examination of Officer Webster, twice asked and was twice denied the name and identity of the informer. The defendant's right to test the reasonableness of the officer's conduct, and to impeach his testimony as to the reliability of the informer, was thereby frustrated.
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> Here the defendant's conviction stands or falls on the determination whether there was reasonable ground for his arrest. That determination turns upon the existence and the reliability of the informer. There was no independent corroboration, and without knowledge of the identity of the informer the defense can not effectively contest the policeman's opinion as to his reliability. Rational appraisal by the court is foreclosed, and the policeman himself conclusively determines the validity of his own arrest.
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> The answer to what the opinion of the court characterizes as the basic question here,—'whether the right of the individual to protection against the harassment of

unreasonable searches and false arrests is superior to the necessity of protecting the public against the evils of organized crime,'—was given long ago. It is clearly stated in the provisions of the constitutions of the United States and of this State which prohibit unreasonable search and seizure. Those provisions charge the courts with the responsibility of enforcing limitations upon arrest and upon the introduction of illegally seized evidence. The courts can not discharge that responsibility unless they can look behind the policeman's assertion. I would therefore reverse the judgment and remand the cause for a new trial, in accordance with the weight of persuasive authority. Scher v. United States, 305 U. S. 251, 59 S. Ct. 174, 83 L. Ed. 151; Wilson v. United States (3rd cir.), 59 F. 2d 390 (1932); United States v. Blich, 45 F. 2d 627 (D. C. Wyo. 1930); United States v. Keown, 19 F. Supp. 639 (W. D. Ky. 1937); Smith v. State, 169 Tenn. 633, 90 S. W. 2d 523." (192 N. E. 2d 379, 383-4.)

In addition, Justice Schaefer in his dissent quoted from two authorities previously cited and quoted above: Mr. Justice Traynor's opinion in *Priestly* v. *Superior Court*, 50 Cal. 2d 812, 330 P. 2d 39, and Judge Bazelon's statement in *Jones* v. *United States*, 266 F. 2d 924.

In the case at bar, Justice Schaefer concurred "under the compulsion of *People* v. *Durr*, 28 Ill. 2d 308, 192 N. E. 2d 379."

Respectfully, and with the utmost of caution, we are constrained to believe that the Illinois Supreme Court, and the courts of some of the other jurisdictions, have taken the easy way out. It is far easier to uphold the validity

of an arrest based upon a policeman's word and let it go at that. No one can contest the officer's testimony that he had an informer, and that he said what the officer says he said, simply because the accused is unable to prove otherwise. Therefore, there must have been an informer, and he must have told the officers what they say he did, and anyway, what real difference does it make because he is " . . . an informer and nothing more." *Miller* v. *United States*, 273 F. 2d 279, 281. He has nothing to contribute " . . . to a fair determination of the cause." *United States* v. *Whiting*, 311 F. 2d 191, 195. He did not help "to set up the crime and was [not] present at its occurrence." *Jones* v. *United States*, 271 F. 2d 494, 496. His name is not "necessary or desirable to show the prisoner's innocence." *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652.

Dissenting in *United States* v. *St. Pierre*, 132 F. 2d 837, at p. 848, the late Mr. Justice Jerome Frank succinctly stated his belief in the "fullest practical disclosure" in another connection:

> "Since I thing that the fullest practicable disclosure to the courts of all important evidence bearing on the facts of cases is essential to the administration of justice, I agree heartily with critics of all privileges accorded witnesses that each of those privileges needs periodic examination to determine whether the policy which prompted it is sufficient to outweigh its interference with access to such evidence. Indeed, I take far more seriously than do many of those critics the idea that, if courts of justice are to do justice, it is imperative that the courts come closer than they do today to the actual facts, and exercise more care in the art of fact-finding."

And this, if this Court please, is exactly our point. This Court should at long last examine the entire so-called "informer's privilege" and make a fresh determination, using *Roviaro* v. *United States*, 353 U. S. 53 as a foundation, ever keeping in mind that:

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." [*McNabb* v. *United States*, 318 U. S. 332, 343, 87 L. Ed. 819, 825, 63 S. Ct. 608.]

Your Honors must surely be aware that the holding in *Roviaro* v. *United States*, 353 U. S. 53, has generated a flurry of inventive activity in a search for mechanistic slogans designed to circumvent the effect of that decision. Against that pernicious search, we pray that this Court resolutely set its face.

2.

The Sixth Amendment Guarantees an Accused the Rights of Confrontation, Cross-Examination, and Compelling Witnesses in His Behalf. These Guarantees Have Already Been Held Applicable to and Binding Upon the States. These Rights Are Denied When the Prosecution Is Allowed to Cloak in Secrecy a Purported Informer Whose Supposed Communications Are Offered in Any Way Against an Accused.

The Sixth Amendment to the Constitution of the United States of America provides, in part, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Under other factual circumstances this Court has held that the Sixth Amendment Confrontation Clause applies, through the Fourteenth Amendment, to the States in a State prosecution:

> "We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment." [*Pointer* v. *Texas*, 380 U. S. 400, 403, 13 L. Ed. 2d 923, 85 S. Ct. 1065.]

But this Court did not stop there; it went on in the next paragraph to hold the obvious—that the right of confrontation includes the right of cross-examination:

"It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See e.g. 5 Wigmore, Evidence ¶1367 (3d ed. 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as protection for defendants in criminal cases. This Court in Kirby v. United States, 174 U. S. 47, 55, 56, 19 S. Ct. 574, 577, 43 L. Ed. 890, referred to the right of confrontation as [o]ne of the fundamental guaranties of life and liberty, and a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most, if not of all, the states composing the Union. Mr. Justice Stone, writing for the Court in Alford v. United States, 282 U. S. 687, 692, 51 S. Ct. 218, 219, 75 L. Ed. 624, declared that the right of cross-examination is one of the safeguards essential to a fair trial. And in speaking of confrontation and cross-examination this Court said in Greene v. McElroy, 360 U. S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377:

'They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. 360 U. S. at 496-497, 79 S. Ct. at 1413 (footnote omitted).'

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witness against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In In re Oliver, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682, this Court said:

'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence: and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. 333 U. S. at 273, 68 S. Ct. at 507 (footnote omitted).'

"And earlier this Term in Turner v. State of Louisiana, 379 U. S. 466, 472, 473, 85 S. Ct. 546, 550, 13 L. Ed. 2d 424, we held:

'In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from

the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.'" (380 U. S. 400, 404.)

Accord, *Douglas* v. *Alabama*, 380 U. S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074, decided the same day as *Pointer* v. *Texas*, 380 U. S. 400 (*supra*).

As noted, one of the cases relied upon by Mr. Justice Black, speaking for the Court in *Pointer* v. *Texas*, 380 U. S. 400, was *Alford* v. *United States*, 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 218. Mr. Justice Stone in *Alford* developed, in simple language, the absolute fundamental necessity of full cross-examination:

"Cross-examination of a witness is a matter of right . . . Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood . . . that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment . . . and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased . . . Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply . . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to

> place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial . . . In this respect a summary denial of the right of cross-examination is distinguished from the erroneous admission of harmless testimony." (282 U. S. 687, 691.)

The California courts have recognized the importance of full confrontation and cross-examination in informer cases.

In *People* v. *Kiihoa,* 3 Cal. Rptr. 1, the prosecution withheld prosecution of the defendant until the informer was out of the jurisdiction. The court held this to be a violation of due process. But the court also held it violated the defendant's inalienable right to confront the witnesses against him:

> "The right of an accused to be confronted with the witnesses is the—right to have—witnesses who testify do so in the presence of and subject to cross-examination by the defendant. The prosecution is not required to call any particular witness, nor to put on all the evidence relating to a charge so long as all material evidence bearing thereon is fairly presented in such a manner as to accord to the defendant a fair trial." [3 Cal. Rptr. 1, 3.]

Accord: *Crosby* v. *State,* 90 Ga. 63, 82 S. E. 2d 38.

Contrast the language in the above holding with the following words of Mr. Justice Solfisburg in the instant cause:

> "We understand the defendant's cross-examination on this issue is limited by the nondisclosure of the informant, but we feel that this right of full cross-examination must give way in the face of a compelling policy to protect informants in the stealthy and vicious traffic in narcotics. The preliminary hearing, and the information given by the informant, did not go to the guilt or innocence of the accused. There is no suggestion that the informant was so involved in defendant's activity that fundamental fairness requires that his identity be revealed for the defense of the charge (Cf. People v. Mack, 12 Ill. 2d 151, 145 N. E. 2d 609, Roviaro v. United States, 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639). Nor is defendant denied the right to face his accuser in any constitutional sense, for nothing the information revealed would be admissible on the trial." [210 N. E. 2d 161, 164.]

Most respectfully, nothing is said in the Sixth Amendment about protecting informers by limiting the accused's guarantee of confrontation and cross-examination.

Mr. Justice Solfisburg's statement—that the defendant has not been "denied the right to face his accuser in any constitutional sense"—has been answered by Mr. Justice Traynor in *Priestly* v. *Superior Court*, 330 P. 2d 39:

> "The People contend that even if disclosure is required at the trial, it should not be required at the preliminary hearing. Since the purpose of the preliminary hearing, however, is to determine whether there is competent

evidence to commit the defendant for trial, disclosure at that time is necessary to determine whether the evidence acquired by the search is competent. The defendant may not be committed for trial when there is no competent evidence to support a belief that he is guilty of a public offense. Moreover, disclosure at the preliminary hearing will ordinarily obviate the necessity of a continuance during the trial to permit the defendant to locate and interview the informer. Defendant was therefore entitled either to disclosure of the informers' identities or to the striking on proper motion of the testimony of the officer as to the communications of the informer offered to establish the legality of the search." (330 P. 2d 39, 43.)

Neither is anything said in the Sixth Amendment to the effect that the right of Confrontation only applies to a trial on the merits.

Quite the opposite. The very same Sixth Amendment that contains the guarantee of Confrontation also promises the accused the right to have the "Assistance of Counsel for his defense." Has this court limited this latter clause to the actual trial on the merits? To the contrary, the Court has held that an accused " . . . requires the guiding hand of counsel at *every step* in the proceedings against him." *Powell* v. *Alabama*, 287 U. S. 45, 69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 84 A. L. R. 527. [Emphasis added.]

This Court has held that the right to counsel provision is binding upon the States (*Gideon* v. *Wainwright*, 372 U. S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792); that the privilege against self-incrimination is also binding upon the States (*Malloy* v. *Hogan*, 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct.

1489); and that by combining the two, the rights exist prior to trial at the time of indictment (*Massiah* v. *United States*, 377 U. S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199); and even in a police station at the time of arrest (*Escobedo* v. *Illinois*, 378 U. S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758), even though no specific request for counsel is made (*Miranda* v. *Arizona*, —— U. S. ——, 16 L. Ed. 2d 694, 86 S. Ct. 1602).

Can it, then, be logically or legally contended that while one clause of the Sixth Amendment exists at the moment of arrest, another clause of the same Amendment is not applicable and binding even on motions made in the courtroom preliminary to trial? We respectfully contend that an accused is entitled to confront the witnesses against him no later than the preliminary stages of his trial.

It is submitted that Confrontation means Confrontation, and that the Illinois Supreme Court has placed a too narrow, a too confining limitation of the privilege.

This Court is requested by the instant petitioner to now hold that the Illinois Supreme Court erred in the instant case, and that the Confrontation Clause applies to preliminary motions to suppress evidence.

3.

Irrespective of the Quantum and Reliability of the Probable Cause for the Instant Arrest, and Irrespective of the Confrontation Aspect, Discussed Above, the Conduct Exhibited by the Officers in Effectuating the Instant Arrest Sank Far Below Minimum Standards of Decency and Fairness, and Thus Violated Petitioner's Right to Due Process.

After petitioner's arrest he was made to strip down to his underwear in pre-dawn, extremely cold January weather (R. 6, 11, & 17). A search of his person was conducted and heroin was seized (R. 7).

In *Beck* v. *Ohio*, 379 U. S. 89, 13 L. Ed. 2d 143, 85 S. Ct. 223, the defendant was arrested and clearinghouse slips were seized in the police station "beneath the sock of his leg." (379 U. S. at 90.) This Court began:

> "There are limits to the permissible scope of a warrantless search incident to lawful arrest, but we proceed on the premise that, if the arrest itself was lawful, those limits were not exceeded here." (379 U. S. 89, 90.)

Accord: *Kremen* v. *United States*, 353 U. S. 346, 1 L. Ed. 2d 876, 77 S. Ct. 828.

On the contrary, it is the position of the petitioner under the instant point of this argument that "those limits" were exceeded in the case at bar.

This Court has frequently held that there are more important considerations in a criminal case than merely those of guilt or innocence. More significant, and of far greater import, is the maintenance of the purity of our judicial system. From earliest days this court has made it plain that the courts cannot relax their vigilance and should be

ever mindful, in the words of *Boyd* v. *United States*, 116 U. S. 616, 29 L. Ed. 746, 752, that:

> "... illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consists more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

The Due Process Clause of the Fourteenth Amendment does not and could not proscribe all specific reprehensible state conduct:

> "What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" [*Herbert* v. *Louisiana*, 272 U. S. 312, 316, 71 L. Ed. 270, 273, 47 S. Ct. 103.]

Lawless police action may take many forms. But this Court has always shown itself to be adequately prepared to cope with official illegality whether it be embodied in the known use of perjured testimony:

> "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed

without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

"The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts.

* * * * *

"The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them" [*Mesarosh* v. *United States*, 352 U. S. 1, 14, 1 L. Ed. 2d 1, 9, 77 S. Ct. 1];

or, coerced confessions:

"We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court" [*Chambers* v. *Florida*, 309 U. S. 227, 241, 84 L. Ed. 716, 724, 60 S. Ct. 472];

or, entrapment by government officials or those working for them:

"Law enforcement does not require methods such as this" [*Sherman* v. *United States*, 356 U. S. 369, 376, 2 L. Ed. 2d 848, 853, 78 S. Ct. 819];

or, suppression of evidence:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution" [*Brady* v. *Maryland*, 373 U. S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194].

If one regards this Court as the "One Great Scorer" in all matters legal, the words of Grantland Rice, uttered in another connection in "Alumnus Footfall," seem particularly apropos:

> "For when the One Greater Scorer comes
> To write against your name
> He marks—not that you won or lost
> But how you played the game."

And that, apparently, is what this Court asks the law officials—How did you play the game?

> "From a fair reading of these expressions, we cannot but conclude that the question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete dis-

regard of whether or not petitioner in fact spoke the truth." [*Rogers* v. *Richmond*, 365 U. S. 534, 540, 5 L. Ed. 2d 760, 81 S. Ct. 735.]

In our society, in our government of laws, there is a

"deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." [*Spano* v. *New York*, 360 U. S. 315, 320, 3 L. Ed. 2d 1265, 79 S. Ct. 1202.]

We have a choice, said Mr. Justice Holmes, dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 469, 72 L. Ed. 944, 48 S. Ct. 564:

". . . we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."

Dissenting in the same case (involving the constitutionality of the admission into evidence of information secured through wire tapping) Mr. Justice Brandeis stated his abhorrence with the concept of the government as a law breaker:

"The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The Court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by

its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means —to declare that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." (277 U. S. 438, 484.)

There is one "transcending value at stake", said Mr. Justice Frankfurter, concurring in *Sherman* v. *United States,* 356 U. S. 369, 378, 2 L. Ed. 2d 848, 78 S. Ct. 819, and that is the "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law." (356 U. S. 369, 380.)

The conduct of the officers in the case at bar: stopping, arresting, and stripping the defendant in zero temperatures so that a search of his person could be conducted is "conduct that shocks the conscience"—it is a "course of proceeding by agents of government to obtain evidence [which] is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit constitutional differentiation". (*Rochin* v. *California,* 342 U. S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205, 25 ALR 2d 1396).

This case indeed illustrates best why "The lawful instruments of the criminal law cannot be entrusted to a single functionary" (*McNabb* v. *United States,* 318 U. S. 332, 343, 87 L. Ed. 819, 63 S. Ct. 608).

Conclusion

During the course of the motion to suppress evidence, as aforesaid, the defense counsel asked one of the arresting officers, Officer Jackson, for information concerning the identity of the informer. The following proceedings then occurred:

> "Q. Very cold. What is the name of this informant that gave you this information?
>
> Mr. Engerman: Objection, Your Honor.
>
> The Court: State for the record the reasons for your objection.
>
> Mr. Engerman: Judge, based upon the testimony of the officer so far that they had used this informant for approximately a year, he has worked with this indi [fol. 22] vidual, in the interest of the public, I see no reason why the officer should be forced to disclose the name of the informant, to cause harm or jeopardy to an individual who has cooperated with the police. The City of Chicago have a tremendous problem with narcotics. If the police are not able to withhold the name of the informant they will not be able to get informants. They are not willing to risk their lives if their names become known.
>
> In the interest of the City and the law enforcement of this community, I feel the officer should not be forced to reveal the name of the informant. And I also cite People vs. Durr.
>
> The Court: I will sustain that.
>
> Mr. Adam: Q. Where does this informant live?
>
> Mr. Engerman: Objection, your Honor, same basis.
>
> *The Court*: Sustained." (R. 12).

On March 15, 1966, this Honorable Court directed the Office of the Clerk of the Court to request the Honorable William G. Clark, Attorney General of Illinois, to file a response to the petition for certiorari then pending before this Honorable Court. The Attorney General of Illinois did so reply, and on page 7 of their *"Brief in Opposition to Petition for Writ of Certiorari"*, we find the following:

> "If as the petitioner suggests the identity of an informer must be divulged and said informer produced, a needless and tragic blow would be struck to the enforcement of the narcotics laws of the federal and state governments. It would deprive law enforcing officers of a key source of information now utilized to make narcotic arrests. It would destroy the balance between the public interest in protecting the flow of information against the individual's right to prepare his defense. The informer's privilege would be non-existent and society would lose a vital aspect of its defensive arsenal against the narcotic traffic. The courts have generally recognized the proposition that the government need not disclose the name or identity of an informer who had given information which furnished probable cause for arrest, especially which said information is corroborated as in the case at bar." (Citations omitted.)

In essence, then, we believe that it can fairly be said that it is the position of the Respondent, both at the trial level, and before this Court, that the so-called "informer's privilege" should be retained for two reasons:

1.) Protection of the free flow of information; and

2.) Protection of the life and welfare of the informer himself.

The answer to the first of these reasons has been given elsewhere in this brief, and it would merely be repetitious to repeat all that has been said previously on this point.

The answer to the second reason has already been given by this Honorable Court in *Piemonte* v. *United States*, 367 U. S. 556, 6 L. Ed. 2d 1028, 81 S. Ct. 1720, a case factually dissimilar from the instant one. In *Piemonte*, the defendant was convicted of criminal contempt for refusing to answer certain questions after having been granted immunity from prosecution.

In upholding his conviction, this Court said in footnote No. 2, 367 U. S. 556, 559:

> "2. Neither before the Court of Appeals nor here was fear for himself or his family urged by Piemonte as a valid excuse from testifying. Nor would this be a legal excuse. Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law. See Brown v. Walker, 161 U. S. 591, 600, 40 L. Ed. 819, 822, 16 S. Ct. 644. Lord Chancellor Hardwicke's pithy phrase cannot be too often recalled: '[T]he public has a right to every man's evidence.' 12 Hansard's Debates 693; 8 Wigmore, Evidence (3d ed.), p. 64, ¶2192.
>
> If two persons witness an offense—one being an innocent bystander and the other an accomplice who is thereafter imprisoned for his participation—the latter has no more right to keep silent than the former. The Government of course has an obligation to protect its citizens from harm. But fear of reprisal offers an im-

munized prisoner no more dispensation from testifying than it does any innocent bystander without a record."

Can it now be contended that this Court should countenance a greater protection for such persons than this Court was willing to confer on private citizens?

In conclusion, then and without passion, yet neither by mincing words, petitioner characterizes what has occurred in this case as merely an extension of an odious and terrifying shadow which almost silently crept into, and now seeks to pervade entirely, our sacred judicial system: The faceless, nameless informer—that scourge of liberty from time immemorial.

Your petitioner is not the first victim. He will not be the last. Yet, better than any case of which we are cognizant, the instant cause illustrates the depths of degradation to which the concept of a secret (but, of course, "reliable") informer has brought us. In the instant case, solely on the word of police officers that they had the word of some "special police informer", an American citizen, in the Sovereign State of Illinois, in the year 1964, was made to strip nearly naked on a public street in extremely cold pre-dawn hours, searched, and then arrested. Petitioner was subsequently convicted of unlawful possession of a narcotic drug. Not once was he allowed to confront his purported accuser. And all this, we are told, is justifiable "in the interest of the City and the law enforcement of this community" (R. 12). How far we have regressed since the days when our founding fathers died for the principle that it is for the purpose of securing liberty that "Governments are instituted among men!"

In a single paragraph of only four sentences the Supreme Court of Illinois recognized, yet swept away, no less than three of petitioner's constitutional guarantees, i.e. the rights of cross-examination, confrontation, and fundamental fairness:

> "We understand that defendant's cross-examination on this issue is limited by the nondisclosure of the informant, but we feel that this right of full cross-examination must give way in the face of a compelling policy to protect informants in the stealthy and vicious traffic in narcotics. The preliminary hearing, and the information given by the informant, did not go to the guilt or innocence of the accused. There is no suggestion that the informant was so involved in defendant's activity that fundamental fairness requires that his identity be revealed for the defense of the charge. (Cf. People v. Mack, 12 Ill. 2d 151, 145 N. E. 2d 609; Roviaro v. United States, 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639.) Nor is defendant denied the right to face his accuser in any constitutional sense, for nothing the information revealed would be admissible upon the trial of the charge." (*People* v. *McCray*, 33 Ill. 2d 66, 210 N. E. 2d 161, 164.)

Petitioner's trial took place in July, 1964, several centuries removed from that day when Socrates was condemned to imbibe "the bitter drink." Yet in an age when men seek to visit other planets, the instant cause illustrates how little, really, we have advanced since Plato tells us Socrates cried:

> "And, hardest of all, I do not know and cannot tell the names of my accusers . . . All who from envy and

malice have persuaded you—some of them having first convinced themselves—all this class of men are most difficult to deal with, for I cannot have them up here, and cross-examine them, and therefore I must simply fight with shadows in my own defense, and argue when there is no one who answers."

Rome, too, felt the affliction. Will Durant in Volume III, *Caesar and Christ*, Simon and Schuster, 1964, p. 262, relates:

"Since Rome had no public prosecutor or attorney general, and (before Augustus) no police, every citizen was empowered and requested to accuse before the courts any person whom he knew to have violated a law. If the accused was condemned, the delator or informer was awarded a fourth of the convicted man's goods, while the state confiscated the rest. Augustus had used this dangerous procedure to enforce his marriage laws. Now, as plots multiplied against Tiberius, delators sprang up to profit from denouncing them; and the supporters of the Prince in the Senate were ready to prosecute such accusations vigorously. The Emperor sought to restrain them. He interpreted the law strictly in the case of persons charged with defaming the memory or statues of Augustus but 'personalities leveled against himself,' says Tacitus, 'were to be let pass unpunished.' He assured the Senate that his mother Livia wished a similar leniency shown to assailants of her good name."

Later in the same work the author tells us: "Delators, who had almost disappeared for a century, returned to activity and favor, and a new terror raged in Rome" (idem p. 447).

One of the most illustrative of the works on informers which we have perused is *"Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocators"* by Richard C. Donnelly, 60 Yale L. J. 1091.

"From early times law enforcement authorities have utilized informers. Their value in ferreting out crime was recognized in the ancient practice of English medieval law called *approvement*. Being arraigned on a charge of treason or felony the *approver* confessed his guilt and, in order to obtain a pardon, offered to appeal and convict other criminals called appellees. If the appellees were found guilty the approver was pardoned. If the appellees were acquitted, the approver was hanged. The approvement was open to obvious abuses and Sir Matthew Hale observed that 'this course of admitting of approvers hath been long disused, and the truth is, that more mischief hath come to good men by these kind of approvements by false accusations of desperate villians, than benefit to the public by the discovery and convicting of real offenders, gaolers for their own profits often constraining prisoners to appeal honest men.'

"During this period there was no organized police force. Except in the central courts, the administration of justice was in the hands of amateurs whose probity was not infrequently open to suspicion. To create public interest in law enforcement a common expedient was the statutory informer's suit which gave any member of the public the right to sue for, and retain a part of, the penalty imposed for statutory violations. The number of these statutes was large and they greatly increased during the 16th and 17th centuries as a technique for implementing the economic and commercial

policy of the times. The informer's suit was also subject to many abuses and Coke classed informers with 'the monopolist, the concealer, and the dispencer with publick and profitable penal laws' as the four varieties of 'viperous vermin, which endeavoured to have eaten out the sides of church and commonwealth.' The informer's suit has survived without mutation to the present day.

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"The informer's motivations are legion. In addition to promises of immunity or leniency he may be prompted by revenge, money, fear, jealousy, friendship with members of the police force, or—in the case of the apostate—a desire to re-establish his value position in the community.

"The paid informer may be compensated directly out of police contingency funds, out of resultant fines, or under express statutory authorization. [Idem, p. 1092, footnote #7.]

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"The historian Sir Erskine May expressed a view which is rather typical:

'The relations between the government and its informers are of extreme delicacy. . . . [T]o retain in government pay and to reward spies and informers, who consort with conspirators as their sworn accomplices and encourage while they betray them in their crimes, is a practice for which no plea can be offered. No government, indeed, can be supposed to have expressly instructed its spies to instigate the perpetration of crime; but to be unsuspected, every spy must

be zealous in the cause which he pretends to have espoused; and his zeal in a criminal enterprise is a direct encouragement of crime. So odious is the character of a spy, that his ignominy is shared by his employers, against whom public feeling has never failed to pronounce itself, in proportion to the infamy of the agent and the complicity of those whom he served.' [Idem, p. 1093, footnote #9.]

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"Though considered essential by the police in enforcing vice legislation, the stool pigeon system breeds abominable abuse. Frequently a person who will accept payment from the police to assist in the apprehension of prostitutes, gamblers, and liquor or narcotics violators will also accept payment from these persons to deceive the police. The stool pigeon himself may be a drug addict, pickpocket, pimp, or other petty criminal. The spectacle of government secretly mated with the underworld and using underworld characters to gain its ends is not an ennobling one. The employment of stool pigeons by the police probably arouses more resentment and hatred than any other non-violent abuse. Even confirmed law-breakers have their standards of 'squareness.' To them the stool pigeon situation is the outstanding proof that law enforcement is not square. Contempt for law is thus encouraged. In addition, the temptation to 'frame' a case is great." [Idem, p. 1094.]

Several members of this very Court have protested against the use of unproduced and unidentified informers in any type of a proceeding, especially a judicial one.

Dissenting in *Carlson* v. *Landon*, 342 U. S. 524, 96 L. Ed. 547, 72 S. Ct. 525, Mr. Justice Black refers to informers as "a class not usually rated as the most reliable by people who have had experience with them" (342 U. S. 524, 552), and then quotes, in footnote #7, 2 Gibbon, *The History of the Decline and Fall of the Roman Empire* (Oxford University Press), pp. 107, 108 as follows:

> "'Anonymous information ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent and is quite foreign to the spirit of our age.' Written near 100 A.D. by Emperor Trajan to Pliny the Younger in response to Pliny's interesting report of his prosecution of Christians. 9 Harvard Classics, 428. Pliny was 'in great doubt' even then as to 'whether the very profession of Christianity, unattended with any criminal act, or only the crimes themselves inherent in the profession are punishable. . . .' Supra, 426. 'If they [informers against Christians] succeeded in their prosecution, they were exposed to the resentment of a considerable and active party, to the censure of the more liberal portion of mankind, and to the ignominy which in every age and country has attended the character of an informer. If, on the contrary, they failed in their proofs, they incurred the severe and perhaps capital penalty which, according to a law published by the emperor Hadrian, was inflicted on those who falsely attributed to their fellow-citizens the crime of Christianity.'" [342 U. S. 524, 542.]

Writing again in dissent in *Jay* v. *Boyd*, 351 U. S. 345, 100 L. Ed. 1242, 76 S. Ct. 919, Mr. Justice Black expressed even more completely his obvious contempt for a deporta-

tion proceeding in which faceless accusers were allowed to spread their tales while maintaining their anonymity. The full power of his dissent is adumbrated in its opening words: "This is a strange case in a country dedicated by its founders to the maintenance of liberty under law." (351 U. S. at 362.) He then goes on to state:

> "No nation can remain true to the ideal of liberty under law and at the same time permit people to have their homes destroyed and their lives blasted by the slurs of unseen and unsworn informers. There is no possible way to contest the truthfulness of anonymous accusations. The supposed accuser can neither be identified nor interrogated. He may be the most worthless and irresponsible character in the community. What he said may be wholly malicious, untrue, unreliable, or inaccurately reported. In a court of law the triers of fact could not even listen to such gossip, must less decide the most trifling issue on it.
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> "No amount of legal reasoning by the Court and no rationalization that can be devised can disguise the fact that the use of anonymous information to banish people is not consistent with the principles of a free country. Unfortunately there are some who think that the way to save freedom in this country is to adopt the techniques of tyranny. One technique which is always used to maintain absolute power in totalitarian governments is the use of anonymous information by government against those who are obnoxious to the rulers. In connection with another case like this [footnote citation] I referred to a statement made by the Roman Emperor Trajan to Pliny the Younger around the end of the First Century. Rome at that time was

prosecuting the Christians for alleged subversive activities. Pliny expressed his doubts to Trajan as to the best method of handling the prosecutions. He wrote Trajan, 'An anonymous information was laid before me containing a charge against several persons, who upon examination denied they were Christians, or had ever been so. . . .' Trajan replied, 'You have adopted the right course, my dearest Secundus, in investigating the charges against the Christians who were brought before you. . . . Anonymous informations ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent, and is quite foreign to the spirit of our age.'

"It was also foreign to the brave spirit of the American age that gave birth to our constitutional system of courts with their comprehensive safeguards for fair public trials. In those courts a defendant's fate is to be determined by independent judges and juries who hear evidence given by witnesses in their presence and in the presence of the accused. But this case shows how far we have departed from the carefully conceived plan to safeguard individual liberty. Although the Court today pays lip service to judicial review, a hearing officer's condemnation of Jay is held final and unreviewable. His condemnation is an open defiance of all the public testimony given, and rests exclusively on 'confidential information' he claims to have received from unrevealed sources. Unfortunately this condemnation of Jay on anonymous information is not unusual—it manifests the popular fashion in these days of fear. Legal rationalizations have been contrived to shift trials from constitutional courts to temporary removable appointees like the hearing officer who de-

cided against Jay. And when an accused rises to defend himself before such an officer he is met by a statement that 'We have evidence that you are guilty of something, but we cannot tell you what, nor who gave us the evidence.' If, taking the Bill of Rights seriously he complains he is met by the rather impatient rejoinder that the Government's safety would be jeopardized by according him the kind of trial the Constitution commands. But the core of our constitutional system is that individual liberty must never be taken away by shortcuts, that fair trials in independent courts must never be dispensed with. That system is in grave danger. This case emphasizes that fact. Prosecution of any sort on anonymous information is still too dangerous, just as it was when Trajan rejected it nearly two thousand years ago. Those who prize liberty would do well to ponder this." [351 U. S. at 368.]

Mr. Justice Black is not alone among the members of this Court in his protests against what the late Mr. Justice Jackson, writing for the Court in *On Lee* v. *United States*, 343 U. S. 747, 96 L. Ed. 1270, 72 S. Ct. 967, referred to as "dirty business [which] may raise serious questions of credibility." (343 U. S. 747, 757.)

Mr. Justice Douglas has protested powerfully, both in and out of Court, against the use of this highly unAmerican practice. In his book, *An Almanac of Liberty*, Doubleday & Co., Garden City, N. Y., 1954, p. 146, we find the following:

"The use of statements by informers who need not confront the person under investigation or accusation

has such an infamous history that it should be rooted out from our procedure. A hearing at which faceless people are allowed to present their whispered rumors and yet escape the test and torture of cross-examination is not a hearing in the Anglo-American sense. We cannot be proud of the practice—whether the life of a man is at stake, or his reputation, or any matter touching upon his status or his rights.

"If F. B. I. reports were disclosed in administrative or judicial proceedings, it may be that valuable underground sources would dry up. But that is not the choice. If the aim is to protect the underground of informers, the F. B. I. report need not be used. If it is used, then fairness requires that the names of the accusers be disclosed. Without the identity of the informer, the person investigated or accused stands helpless. The prejudices, the credibility, the passions, the perjury of the informer are never known. If they were exposed, the whole charge might wither under the cross-examination."

Again, in the *Anatomy of Liberty*, Credo Series, Trident Press, New York, 1963, p. 30, Mr. Justice Douglas says:

"The 'faceless informer'—one who dares not come into the open and undergo cross-examination—has been a curse to liberty throughout history. His abuses, as we shall see, are the reasons why the right of confrontation was written into the Sixth Amendment of the United States Constitution."

After joining with Mr. Justice Black in the dissent of Mr. Justice Frankfurter in *United States* v. *Nugent*, 346 U. S. 1, 97 L. ed. 1417, 73 S. Ct. 991, Mr. Justice Douglas added a word of his own:

"I concur in Mr. Justice Frankfurter's opinion and only add a word. The use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure. A hearing at which these faceless people are allowed to present their whispered rumors and yet escape the test and torture of cross-examination is not a hearing in the Anglo-American sense. We should be done with the practice—whether the life of a man is at stake, or his reputation, or any matter touching upon his status or his rights. If FBI reports are disclosed in administrative or judicial proceedings, it may be that valuable underground sources will dry up. But that is not the choice. If the aim is to protect the underground of informers, the FBI report need not be used. If it is used, then fairness requires that the names of the accusers be disclosed. Without the identity of the informer the person investigated or accused stands helpless. The prejudices, the credibility, the passions, the perjury of the informer are never known. If they were exposed, the whole charge might wither under the cross-examination." [346 U. S. 1, 13.]

Expanding on this same thesis a little later in *Peters* v. *Hobby*, 349 U. S. 331, 99 L. Ed. 1129, 75 S. Ct. 790, Mr. Justice Douglas said:

"Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal

people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who though sincere, have poor faculties of observation and memory.

Confrontation and cross-examination under oath are essential if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and the outer darkness, without the rudiments of a fair trial. The practice of using faceless informers has apparently spread through a vast domain. It is used not only to get rid of employees in the Government, but also employees who work for private firms having contracts with the Government. It has touched countless hundreds of men and women and ruined many. It is an un-American practice which we should condemn. It deprives men of 'liberty' within the meaning of the Fifth Amendment, for one of man's most precious liberties is his right to work. When a man is deprived of that 'liberty' without a fair trial, he is denied due process. If he were condemned by Congress and made ineligible for government employment, he would suffer a bill of attainder, outlawed by the Constitution. See United States v. Lovett, 328 U. S. 303, 90 L. Ed. 1252, 66 S. Ct. 1073. An administrative agency—the creature of Congress—certainly cannot exercise powers that Congress itself is barred from asserting. See the opin-

ion of Mr. Justice Black in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 144-146, 95 L. Ed. 817, 839, 840, 71 S. Ct. 624.

> Those who see the force of this position counter by saying that the Government's sources of information must be protected. If the campaign against subversives is to be successful. The answer is plain. If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his 'liberty' they must be put to the test of due process of law. The use of faceless informers is wholly at war with that concept. When we relax our standards to accommodate the faceless informer, we violate our basic constitutional guarantees and ape the tactics of those whom we despise." [349 U. S. 331, 350.]

Accord: See Dissenting opinion of Mr. Justice Douglas, *Jay* v. *Boyd*, 351 U. S. 345, 374.

Chief Justice Warren examined the problem in *Green* v. *McElroy*, 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400, where he wrote (360 U. S. 474, 496):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be

faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion."

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He, too, referred to the days of Rome:

"When Festus more than two thousand years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to have stated: 'It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.' Acts 25:16." [360 U. S. 474, 497.]

At least one President of the United States has been infected with the spirit of fairness which only confrontation can bring.

In a Press release of his remarks on November 23, 1953, on receiving the Democratic Legacy Award on the occasion of the 40th anniversary of the Anti-Defamation League, President Eisenhower told of the simple code of fairness by which he grew up:

"It was: meet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. If you met him face to face and took the same risks he did, you could get away with almost anything, as long as the bullet was in the front.

"And today, although none of you has the great fortune, I think, of being from Abilene, Kansas, you live after all by that same code, in your ideals and in the respect you give to certain qualities. In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose."

Respectfully, this Court should require no less that the "bullet [be] in the front."

Petitioner earnestly, respectfully and prayerfully exhorts this Court to reverse the judgment of conviction rendered by the Illinois Courts.

Respectfully submitted,

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